Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-826

967.905 ACRES OF LAND, More or Less, Situate in Cook, Lake and St. Louis Counties, State of Minnesota, et al., JACOB L. PETE and JAMES W. PETE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. _____

967.905 ACRES OF LAND, More or Less, Situate in Cook, Lake and St. Louis Counties, State of Minnesota, et al., JACOB L. PETE and JAMES W. PETE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

Jacob L. Pete and James W. Pete, your petitioners, pray that a writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit, to review their judgment in the above entitled action, entered on October 1, 1971.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Eighth Circuit has not yet been reported; it appears in the Appendix hereto. A petition for rehearing, filed by the petitioners, was denied on September 23, 1971. The Circuit Court modified its opinion and entered judgment on October 1, 1971. These orders are reproduced in the Appendix hereto. The first opinion of the District Court for the District of Minnesota is reported at 305 F. Supp. 83, and is set forth in the Appendix hereto. The District Court order, granting plaintiffs' motion for a new trial, has not been published; it appears in the Appendix hereto. The ruling by the Judge of the District Court during the second trial, affirming his earlier holding on the issue in dispute, is set forth in the Appendix hereto. No opinion was rendered by the District Court following the second trial. The order of the District Court, denying motions by both parties after the second trial for a new trial, was not published; it appears in the Appendix hereto.

JURISDICTION

The judgment of the Circuit Court of Appeals was rendered on August 25, 1971. Petitioners filed a petition for rehearing, which was denied on September 23, 1971. The opinion of the Circuit Court was modified and entered by the Court on October 1, 1971. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Has the Circuit Court deprived petitioners of private property in the form of cabin barges, without providing just compensation, as required by the Fifth Amendment to the United States Constitution, by, in effect, repudiating the law of fixtures?

2. Does not the ruling of the Circuit Court proclaim an intent to create a new body of federal property law for federal eminent domain proceedings as respects fixtures by totally pre-empting state property law in such cases? And is such a project advisable for the federal judiciary?

3. Did the Circuit Court misapprehend as a matter of law, the law relating to fixtures in federal eminent domain proceedings?

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT V

". . . nor shall private property be taken for public use, without just compensation."

STATUTE INVOLVED

This case involves the application of the Declaration of Taking Act, 40 U.S.C.A. §258(a). This statute is set forth in the Appendix hereto.

STATEMENT

This case originated from the filing of a complaint, declaration of taking, and an order of possession, on January 19, 1966, by which the United States acquired title to three parcels of land from Jacob L. Pete and James W. Pete, the petitioners. The filing was done pursuant to the Declaration of Taking Act, 40 U.S.C.A. §258(a), and jurisdiction of the District Court was invoked pursuant to that act. This petition deals only with an issue arising from the taking of one of those parcels, an undivided one-quarter interest in about four acres at Hoist Bay on Basswood Lake, which is on the border between Minnesota and Canada. At this site, hereinafter known as the "Hoist Bay property," the Petes maintained several buildings, including cabin barges on land, and also had three large cabin barges on the adjoining lake. During the winter, at the time of the taking, they were also either on shore or securely moored in a slip right on petitioners' real estate. These barges were constructed on the Hoist Bay property with materials portaged overland to the site. These barges were used by the Petes, in conjunction with the other buildings and structures on the Hoist Bay property, for business purposes. The barges were used as accommodations and a base of operations for fishing parties. They were also used to accommodate winter hunting parties while on shore or frozen fast to the petitioners' real estate. The structures and buildings on the land were used for the same purposes, and as living quarters for the Petes. The barges were frequently situated on the shore during the winter months and at other times for repairs. Because of their size — two stories high — shape and weight, they cannot be removed from the Hoist Bay site.

There were two lengthy trials, including the question of the barges and a number of other issues which are not relevant to this petition, by the District Court for the District of Minnesota. In both trials the Judge of the District Court held that the barges were fixtures under Minnesota law and that the United States government must compensate the Petes for the loss of the barges. At the first trial, the jury placed a value of $149,000 on the land and improvements thereon together with the barges. The land and improvements thereon were also valued separately at $64,000. The jury in the second trial valued the land and improvements thereon together with the barges at $140,500. The decision on the barges was overruled by the Court of Appeals for the Eighth Circuit, which ordered a third trial.

The District Court made, among others, the following crucial factual determinations:

1. That the cabin barges were built on the premises.
2. That the cabin barges required, for their operation, a hotel and motel license from the State of Minnesota.
3. That the cabin barges weighed between twenty-five and forty tons.
4. That the cabin barges could not be removed from their location at the time of taking without destroying them.
5. That the cabin barges enhanced the value of the realty.
6. That the cabin barges were essential to the landowners' use of the land.
7. That the cabin barges were an integral part of the other improvements built upon the land, as well as being an integral part of the land.
8. That two similar barges which had been placed on the land and were used as cabins there were treated as realty by the United States government (Appendix, pp. 35-38).

None of these factual determinations were overturned by the Circuit Court. They held, in effect, that the determination of whether or not the barges constituted fixtures must be determined by federal law. Without giving any authority for their conclusion, they stated that the barges could not be considered as fixtures, according to any law. In reaching their decision, they analogized to a hypothetical situation involving facts almost totally different from those involved in the instant dispute.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decisions of other Courts of Appeals and with the decisions of this Court as to the proper law to be applied in federal eminent domain proceedings.

The District Court clearly stated that it based its decision that the cabin barges were fixtures upon its interpretation of Minnesota law (Appendix, p. 41). The decision of the Court of Appeals does not clearly state what law it used in reaching its decision. They made no effort to determine or apply Minnesota law. They concluded that "under any body of applicable law" the barges could not be considered fixtures (Appendix, p. 9). Neither did they state what bodies of law were applicable. Their language and the result of their holding make it clear to the petitioners that Minnesota law was not considered applicable by the Court of Appeals.

They implied that the Minnesota case first recognizing the doctrine of constructive annexation of fixtures which was relied on by the District Court, *Wolford v. Baxter*, 33 Minn. 12, 21 N.W. 744 (1884); was too old to be relevant (Appendix,

p. 8). That same case was, however, cited as the law of Minnesota by the Eighth Circuit in *Kenneally v. Standard Electronic Corp.*, 364 F. 2d 642 at 646, in 1966. Instead, the Circuit Court looked to two cases which it felt mandated the application of federal law (Appendix, p. 9). They cited the decision of this Court in *United States, ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 87 L. ed. 1390, 63 S. Ct. 1047 (1943), where it was held that the ultimate determination of what is "property" within the just compensation clause of the Fifth Amendment is a federal question. In that same opinion, however, the courts were mandated to look to state law in making their determination:

> "Though the meaning of 'property' as used in . . . the act and in the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law." At 279.

Further, the landowner in that case argued for a determination which would have required the federal government to pay a sum larger than the state would have had to pay if it were to condemn the same property. That is not the situation here. If the State of Minnesota had condemned the Petes' property, they would be held to the same standards which the District Court applied to the federal government.

The Circuit Court also relied upon *Nebraska v. United States*, 164 F. 2d 866 (8th Cir. 1947). In that case the Court held that the federal government was not bound by every "local artificiality or idiosyncrasy" in a state's property law. The recognition by the courts of the State of Minnesota of the principle of constructive annexation of fixtures is not a "local artificiality or idiosyncrasy." It is, if anything, the most generally accepted position on this question in property law today:

> "Although at early common law, annexation or affixation to the soil was the fundamental test or held to be the chief factor in determining whether an object had assumed the character of a fixture, it is no longer the single or even the most important or controlling factor in that determination. *It has been said in a number of decisions that annexation as a test of the character of an object as a fixture is uncertain and unsatisfactory.* . . . 35 Am. Jur. 2d at 703. (Emphasis added.) (36A C.J.S., Fixtures, §6, cites decisions recognizing constructive annexation in over twenty jurisdictions.)

In refusing to apply the tests for fixtures in constructive annexation formulated by the courts of Minnesota, the Court of Appeals is in conflict with this Court's holding in the *Powelson* case. As was indicated above, federal courts were directed to make their determination as to what constitutes property by reference to state law. That was not done in this case.

Their decision also places them in conflict with the decisions of several other circuits. It is, for example, in direct conflict with *United States v. Certain Property, etc.*, 306 F. 2d 439 (2nd Cir. 1962). In that case, which also involved the application of the Declaration of Taking Act, the Second Circuit Court rejected the government's contention that the determination of what constituted compensable fixtures must be made according to federal law. They stated:

> "But nothing in the declaration here suggests an intention that the United States was taking less than all the real property, and nothing in the authorizing statutes suggests any source for defining that save New York law." At 445.

That Court affirmed this holding in a later ruling on the same case, *United States v. Certain Property*, 344 F. 2d 142 (2nd Cir. 1965), and in another case subsequently decided, *United States v. Certain Property in the Borough of Manhattan*, 388 F. 2d 596 (2nd Cir. 1968).

Similar holdings with respect to the applicable law to be used in determining whether or not property constitutes fixtures are found in the Fifth and Seventh Circuits. *Carmichall v. United States*, 273 F. 2d 392 (5th Cir. 1960); *United States v. 19.86 Acres of Land*, 141 F. 2d 344 (7th Cir. 1944). A prior ruling of the Eighth Circuit also held that the determination must be made according to state law. *United States v. Becktold*, 129 F. 2d 473 (1942).

Petitioners have been unable to find a single other instance involving a determination of whether or not a chattel is a fixture in which a Circuit Court has failed to apply state law in a federal eminent domain proceeding. There is conflicting authority where the status of other types of property is involved. In some of these other situations, state law has been applied. *California v. United States*, 395 F. 2d 261 (9th Cir. 1968) (status of submerged coastal lands); *Security Life & Accident Insurance Co. v. United States*, 357 F. 2d 145 (5th Cir. 1966) (United States government treated as a holdover tenant according to Alabama law after the expiration of a lease); *United States v. Smoot Sand & Gravel Corp.*, 248 F. 2d 822 (4th Cir. 1957) (status of sand and gravel deposits under tidal waters).

In other instances involving other types of property, some circuits and the Court of Claims have not applied state law. *Klein v. United States*, 179 Ct. Cl. 910, 375 F. 2d 825, cert. den. 389 U.S. 1037, 19 L. ed. 2d 824, 88 S. Ct. 770, rehearing denied 390 U.S. 975, 19 L. ed. 2d 1192, 88 S. Ct. 1023 (1967) (status of contracts for removal of gravel); *United States v. Pinson*, 331 F. 2d 759 (5th Cir. 1964) (status of easements);

Bumpus v. United States, 325 F. 2d 264 (10th Cir. 1963) (status of mineral rights); *United States v. Certain Interests in Property in Champaign County*, 271 F. 2d 379 (7th Cir. 1959), cert. den. 362 U.S. 974, 80 S. Ct. 1058, 4 L. ed. 2d 1010 (1960) (condemnation of a leasehold subject to an existing mortgage); *Nebraska v. United States*, 164 F. 2d 866 (8th Cir. 1947) (valuation of a fee subject to a lease).

In summary then, the decision of the Eighth Circuit Court in this case is in conflict with the holding of this Court in the *Powelson* case. It is also in conflict with the holdings of the Second, Fifth, and Seventh Circuits on the question as to whether state or federal law shall be applied in determining whether or not property constitutes a fixture. Those three circuits all apply state law, and the Eighth Circuit now refuses to do so. The entire question of determination of what constitutes "property" in federal eminent domain proceedings is one which has caused serious conflict and confusion among the various circuits. There is a real need to develop a definite approach for the Courts to apply.

2. The decision below raises significant and recurring problems concerning efforts to determine what constitutes fixtures in federal eminent domain proceedings.

There is no substantial body of federal property law in existence at the present time. If the Court of Appeals decision is allowed to stand, the federal courts must begin to formulate a federal law of property for use in federal eminent domain proceedings. To complete such a task would be, to say the least, a monumental undertaking. It would burden the courts with considerable lengthy and complicated litigation for many years.

This problem was recognized by the Second Circuit Court in one of their decisions holding that state law must be applied in the determination of whether or not an object is a fixture:

> "We see no basis for doubting that Congress meant that a federal court, in determining what such a taking embraced, should look to the law of the state where the property is located. Although the government urges us to look to 'federal law' to determine what the taking included, it does not tell us where to find this—no corpus of federal law on this subject exists and 1962 seems rather late to start developing one, especially for so limited a function." *United States v. Certain Property, etc.*, 306 F. 2d at 444.

An examination of some of the cases cited above where the courts refused to apply state law demonstrates the potential for the creation of a considerable burden upon the judiciary or the legislative branch.

In the *Nebraska* case, the Eighth Circuit Court relied on *United States v. Miller*, 317 U.S. 369, 87 L. ed. 336, 63 S. Ct. 276 (1943), and a series of other decisions by this Court which developed criteria—which are still subject to considerable litigation—for measuring compensation once it had been determined what property had been taken in federal eminent domain proceedings. Is this Court ready to hear and decide the multifarious issues involved in determining what is property so that a federal law on this question can likewise be developed?

In the *Champaign* case, the Seventh Circuit Court found some guidance as to what the federal law was in the federal statute involved. Will the United States Congress be forced to develop a comprehensive federal statute dealing with all the problems arising from determinations of what is property?

In the *Pinson* and *Bumpus* cases, the Fifth and Tenth Circuit Courts recognized, as the Second Circuit pointed out, that there is no federal law of property. Consequently they applied what they considered to be "general property law." Is this Court ready to become the arbitrator in resolving conflicts between the various federal courts as to what constitutes "general property law"?

Even if the courts or the National Congress wish to develop a comprehensive federal law as to what constitutes property in federal eminent domain proceedings, the wisdom of such an action is questionable. The complete pre-emption of state law in federal eminent domain proceedings would create a severe burden upon all people concerned with transactions involving property. As was stated by the Second Circuit Court:

> "Here the convenience to federal takers and government lawyers in having the same writ run on both sides of the Hudson is of slight significance as compared to the need for New York businessmen planning to invest in trade fixtures to know that what is real property on Broadway if the city or state condemns it, will be no less real property if taken instead by the federal government. Apart from other considerations mentioned in our previous opinion, 306 F. 2d at 444, it would be shocking if tenants, who had invested sums, large in their eyes, in trade fixtures, under leases which, as their lawyers would properly advise, entitle them to compensation on a taking of real estate by the City or State of New York should find themselves wholly uncompensated in a federal condemnation. . . . It is not a sufficient answer that leases could contain special provisions whereby landlords would assign portions of their awards in the contingency of a federal

condemnation. Small businessmen such as the claimants here do not consult condemnation specialists when they make leases, and ought not have to do so." *United States v. Certain Property Located in the Borough of Manhattan*, 344 F. 2d at 144-5.

Resolution of this question is of great importance to the administration of the federal judiciary.

3. The Court below wrongly applied the law of fixtures and deprived petitioners of their private property without providing them with just compensation as required by the Fifth Amendment.

If the Circuit Court had applied Minnesota law, as the District Court did, it would have found that the barges were indeed fixtures. The doctrine of constructive annexation of fixtures has been recognized in Minnesota for almost one hundred years. *Wolford v. Baxter*, 33 Minn. 12, 21 N.W. 744 (1884). It is still the accepted law in Minnesota:

> "The manner in which a chattel is attached to the real estate is not always conclusive but is only one of the factors to be considered in determining whether the article has become a part of the realty or is a removable chattel." *Johnson v. Mugg*, 261 Minn. 451, 113 N.W. 2d 1 (1962) at 3.

The test applied by the courts in Minnesota is whether or not the chattel is an "essential part" of the landowner's use of the real estate. The District Court properly found that the cabin barges were the "very essence of that use." (Appendix, p. 41). (See the *Becktold* case for an instance where the Eighth Circuit applied a similar test for fixtures. In that Missouri case,

they held that compensation for fixtures would be required if they "formed a part of the realty and tended to enhance the value of the realty. . . ." 129 F. 2d at 476.)

The question of whether a chattel is a fixture is largely a question of fact, and each case must be decided on its own peculiar facts. *Holy Ghost Catholic Church v. Clinton*, 169 Minn. 253, 211 N.W. 13 (1926); *Pond & Hasey Co. v. O'Connor*, 70 Minn. 266, 73 N.W. 159 (1897). The District Court based its decision upon its finding of facts, which was outlined in the statement above.

The Eighth Circuit Court based its ruling on a hypothetical set of facts. They assumed that the Petes could simply have moved their base of operations or could have sold the barges to another operator if the federal government had not condemned the entire lakeshore. (Appendix, p. 10) Petitioners respectfully submit that this was in error, for two reasons. First, there was nothing in the record to indicate that this was the case. In fact, the Petes could not have simply shifted their base of operations to another land base located on the lake. The four-mile portage leading to the Hoist Bay property is the only access to the lake. Also, there is nothing in the record to indicate that any other part of the lakeshore would be suitable for use as a base. Further, the government did condemn the entire lakeshore, so there are no other private landowners on the lake who might buy the barges.

Secondly, the Circuit Court was not asked to decide a case where the base of operations could be shifted. It was asked to decide the case where the base of operations could not be shifted and the barges could not be removed. The Court, in essence, decided a hypothetical case rather than the case before it.

Assuming, as petitioners believe they must, that the Circuit Court applied federal law in making its decision, they incor-

rectly stated the law. Petitioners are unaware of any federal property law on the question of fixtures. Apparently the Circuit Court used the same approach as the courts in *Pinson* and *Bumpus* did when they applied general property law in the absence of any federal law. Petitioners believe that the general property law on this question also recognizes constructive annexation (see the references to Am. Jur. and C.J.S. above). Consequently, the Court was wrong in holding that "boats" are an almost complete "antithesis" to fixtures. (Appendix, p. 9) Their duty was to look at the specific facts involved, rather than to establish arbitrary blanket categories.

The only analogous case which petitioners have been able to find in the general property law is *Colorado Gold Dredging Co. v. Stearns-Roger Manufacturing Co.*, 60 Colo. 412, 153 P. 365 (1915). In that case the landowner maintained a dredge on an artificial lake adjacent to their mine site. A question arose as to whether or not the dredge was a fixture, since it was not physically attached to the property. It was not feasible to remove the dredge from the mine site. The court held that the dredge was constructively attached to the realty and that it was a fixture.

The result of the refusal of the Circuit Court to apply the principle of constructive annexation to the petitioners' barges is that they have been denied the just compensation which the Fifth Amendment dictates that they be granted. Because the barges cannot be removed, they have been taken with the rest of the realty:

> "In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former

> owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupation has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." *United States v. General Motors Corp.*, 323 U.S. 373, 89 L. ed. 311, 65 S. Ct. 357 (1944) at 378.

Yet the Petes, as owners of the barges, will receive no compensation for them.

It is one of the fundamental principles of our democratic system that the state may not take private property without providing just compensation:

> "It may well be doubted whether the nature of society and government does not prescribe some limits to the legislative powers; and if any be prescribed, where are they to be found if the property of an individual, fairly and honestly acquired, may be seized without compensation?" *Fletcher v. Peck*, 10 U.S. (6 Cranch) 875 (1810) at 135.

Just compensation is, of course, a concept which is difficult to define with precision. A general standard was set forth by this Court in *United States v. Miller*, 317 U.S. 369, 87 L. ed. 336, 63 S. Ct. 276 (1942):

> "The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." At 373.

This standard has not been met by the Eighth Circuit Court in this case. The petitioners have been denied any compensation for their cabin barges which have been taken by the federal government.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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December 20, 1971.

APPENDIX A: OPINION OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 20,709 and 20,710

United States of America,
Appellant and Cross-Appellee,

v.

967.905 Acres of Land, More or Less, Situate in Cook, Lake and St. Louis Counties, State of Minnesota, et al., Jacob L. Pete and James W. Pete,
Appellees and Cross-Appellants.

Appeals from the United States District Court for the District of Minnesota.

[August 25, 1971.]

Before MATTHES, Chief Judge, GIBSON, Circuit Judge, and HENLEY, District Judge.*

HENLEY, Chief District Judge.

These cases represent an appeal and cross appeal from a final judgment of the United States District Court for the District of Minnesota awarding just compensation in

* Chief Judge, Eastern District of Arkansas, sitting by designation.

an eminent domain case. The Government is appellant and the landowners are appellees in the basic appeal; their positions are reversed in the cross appeal.

The land involved which we will refer to as Tract 3520 or as "the Pete property" is located on Hoist Bay in Basswood Lake which is a large body of navigable water located on the Minnesota-Canadian boundary. The Lake is practically landlocked; part of its shore line is located in Minnesota, and the rest of it is in Canada. The Lake is located in the Superior National Forest and is included in a wilderness area known as the Boundary Waters Canoe Area; the Forest and Canoe Area are administered by the Forest Service of the United States Department of Agriculture.[1]

The question of how much the Government must pay for the taking of the tract in question has been the subject of two protracted jury trials and has produced several memorandum opinions of the District Court, one of which, filed between the first trial and the second trial, appears in 305 F.Supp. 83 (1969). That opinion contains an excellent description of the Boundary Waters Canoe Area and of Government action in connection with the Area. The opinion also contains a full statement of the background facts of the case.

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[1] The Superior National Forest was created originally by a 1909 Proclamation of President Theodore Roosevelt, 35 Stat. 2223. It was expanded by the Shipstead-Nolan Act of 1930, 16 U.S.C.A., §§577, 577a, and 577b, and was dealt with further in the Thye-Blatnik Act of 1948, 16 U.S.C.A., §§577c and 577d. The National Wilderness System was established by the Act of September 3, 1964, 78 Stat. 890, 1133, which Act refers specifically to the Boundary Waters Canoe Area. Section 5(c) of that Act authorizes the acquisition of privately owned wilderness lands by the exercise of the Government's power of eminent domain if the owner concurs in the acquisition or if the acquisition is specifically authorized by Congress. No question is here raised as to the propriety of the taking. The Government proceeded under the Declaration of Taking Act, 40 U.S.C.A., §258a, and made a deposit of money in the registry of the District Court as estimated just compensation.

For many years Jacob L. Pete and his son, James W. Pete, operated a sports fishing and hunting resort on Hoist Bay using Tract 3520 as a base of operations. Tract 3520 consists of two parcels of non-contiguous land. The larger parcel contains 40 acres of unimproved land traversed by what is known as Four Mile Portage. The smaller parcel, described at times as Government Lot 6, contains a few acres of land that had been improved by the Petes by the erection of certain buildings and structures as the living quarters of themselves and their families and for the accommodation of visiting hunters and fishermen. The Petes owned only an undivided one-fourth interest in the lands; the other interest was owned by the Izaak Walton League of America Endowment.[2] However, the Petes owned all of the improvements on Government Lot 6, and they made use of all of the property without paying rent to the League and without accounting to the League for any profits from their commercial operations.

In connection with their business the Petes owned and operated three large cabin barges or houseboats capable of transporting large parties of fishermen from place to place on Basswood Lake and of accommodating them over night and for several days at a time. Pete clients would embark on the barges where they would remain during their stays, traversing the Lake and doing their actual fishing from smaller boats which when not in actual use would be moored to or towed by the barges.[3]

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2 The League settled its claim for just compensation and it is not involved in this appeal. There has never been any controversy between the League and the Petes.

3 As will be seen presently, the question of whether the Petes are entitled to be paid for the barges in this proceeding is the most interesting and probably the most important question in the litigation. It should be mentioned that there were originally six barges belonging to the Petes. Prior to the taking three of those barges had been removed permanently from the water and had been converted into living quarters on Lot 6. It is conceded that those three barges constituted compensable improvements to the property.

On December 21, 1965, the Forest Service acting under statutory authority promulgated regulations designed sharply to curtail or prohibit altogether commercial operations in the Canoe Area such as those of the Petes. 30 F.R. 15,738, 36 C.F.R. §251.85. This action was commenced on January 20, 1966. On that day the Government filed its complaint and declaration of taking and obtained from the District Court an order authorizing it to take immediate possession of Tract 3520. At about the same time the Government acquired all of the other privately owned land on the American side of Basswood Lake, and the Canadian Government acquired all of the privately owned land on the Canadian shore of the Lake.

That action which was ultimately to destroy the business of the Petes created quite a problem about the barges, which for convenience we will call simply the "boats," since they would be deprived of any land base on the Lake and since, according to the finding of the District Court, they could not be removed from the Lake except at prohibitive cost. The Petes claim that they are entitled to be compensated for the boats in this action; the Government says that it is not required to pay for the boats.

Although the order of possession issued by the District Court in January 1966 required the Petes to yield possession immediately, the Forest Service took no steps to obtain immediate possession. On the contrary there was an agreement between the Forest Service and the Petes whereby the latter were permitted to remain in possession of Tract 3520 and to continue their commercial operations which included the use of the boats. The understanding between the Forest Service and the Petes was oral, and the record does not disclose its precise terms or the precise motivation of the Service in permitting the Petes to

remain and continue to operate on the Lake. The understanding did not include any requirement that the Petes pay the Government any rent, and they have never paid or tendered any. No demand for rent was made by the Government until after the first trial.

Prior to the first trial the District Court determined, and has adhered consistently to its determination, that it was not feasible to remove the boats from the Lake, that they were "fixtures" "constructively joined" to the realty, and that they should be considered as part of the realty and taken into consideration by the jury in valuing the land.

The first trial of the case took place in June and July, 1969, and the jury was instructed in detail as to the law that would govern it in its deliberations. However, the instructions did not incorporate the rule laid down in *United States* v. *Rands*, 389 U.S. 121 (1967), to the effect that where lands riparian to navigable waters are condemned by the Government the landowner is not entitled to be compensated for his lands above ordinary high water mark on the basis of any enhanced value due to their access to the water.[4]

The first jury found that the portion of Tract 3520 identified as Government Lot 6 had a value, as enhanced by the boats of $149,000 and that without the boats being considered the value of the land and improvements thereon was $64,000.

On September 11, 1969, the District Court ordered the Clerk to enter judgment based on the $149,000 valuation

[4] In *United States* v. *Birnbach*, 8 Cir., 400 F.2d 378 (1968), we applied *Rands* to a partial taking which deprived the owner of that portion of his lands which was riparian to the Arkansas River in Pulaski County, Arkansas.

and in that connection filed its memorandum opinion that was published and has been cited heretofore. In that opinion the Court set out the reasoning which led it to its conclusion that the boats should be considered as part of the realty.

In the course of the first trial the Government undertook to show the value of the tract by the capitalization of income method of valuation, and its expert used a capitalization rate of 7 percent per annum. On September 22 the Government filed a motion for an allowance of rent at the annual rate of 7 percent of the award for the period of time during which the Petes had remained in possession of their properties after the taking[5] and also filed other motions including an alternative motion for a new trial.

In January 1970 the District Court ruled on all motions pending before it. The Court renewed its holding that the boats were part of the real estate and were compensable, and it denied the Government's claim for rent. However, the Court concluded that it had erred in not applying *Rands*, supra, and ordered a new trial to correct its supposed error in that regard. But, the Court was not willing to apply *Rands* to the improvements on the tract including the boats.

The second trial took place in June 1970 and resulted in a verdict as to Lot 6 in the sum of $140,500 with the boats being included in the valuation. The second jury was not asked to value the tract without the boats. However, it was called upon to value the 40-acre portion of Tract 3520 separately, and it valued that portion at $1,000.

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5 The Petes' operation of the boats was seasonal. It appears from the record that they operated during the 1966, 1967, 1968, and 1969 seasons after which they yielded possession to the Government and presumably abandoned the boats, the present status of which is not clear.

Both sides filed post-trial motions which the Court considered and denied on August 11, 1970. These appeals followed, and the case is properly before us.[6]

As appellant in No. 20,709 the Government contends that the District Court erred in allowing compensation for the boats, and in limiting its application of *Rands* to the lands themselves while refusing to apply that case to the improvements, and in refusing the Government's prayer for rent.

As appellants in No. 20,710 the landowners urge that the District Court should not have applied *Rands* to the lands, and that it erred in so doing.

For reasons to be stated we reverse on both appeal and cross appeal and remand the case for appropriate proceedings including a new trial if the parties are not able to come to an amicable settlement.

I.

Taking up, first, the controversy about the boats, we hold that the District Court permissibly found that due to their size, shape, and weight the boats could not have been removed from the Lake without dismantling them completely, carrying the pieces across Four Mile Portage and then reassembling the boats, and that the cost of such a procedure would have been prohibitive.

The landowners did not contend in the District Court nor do they contend here that they are entitled to compensation for the boats, treated as personal property, on

[6] We note in passing that between the first trial and the second trial this Court declined to entertain an interlocutory appeal although the District Court certified that the case was a proper one for such an appeal. 28 U.S.C.A., §1292(b).

the basis of the fact that the actions of our Government and of the Government of Canada which have been described effectively denied the landowners use of the boats and destroyed their economic utility so that in a broad sense it might be said that the Government had "taken" the boats. Whether such a theory would have prevailed had the Petes sought relief in the Court of Claims is a question upon which we need not speculate; the possibility of such relief was suggested by the District Court in its published opinion. 305 F.Supp. at 91-93.

As the District Court recognized, 305 F.Supp. at 92, when the Government condemns real estate only, it is not required to pay for personal property or for the cost of removing personal property from the land. *United States* v. *General Motors Corporation*, 323 U.S. 373 (1944); *Sykes* v. *United States*, 8 Cir., 392 F.2d 735 (1968). Hence, the landowners must stand or fall on their proposition that in the rather peculiar circumstances of this case the boats are to be considered as part of the real estate that the Government condemned.

In determining that the boats were part of the realty the District Court adopted the characterization that it thought would be given to them by the State courts of Minnesota in the application of the property law of that State and drew analogies between the boats and certain objects like screens and storm windows attached to houses and which are considered to be fixtures even though readily removable from the houses. The Court laid considerable emphasis on the old Minnesota case of *Wolford* v. *Baxter*, 33 Minn. 32, 21 N.W. 744 (1844). (305 F.Supp. at 88-89.)

It is quite true that in a condemnation case a federal court will ordinarily look to State law to determine whether

a given object is real property or whether it is personal property. *U.S. ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266 (1943); *California* v. *United States*, 9 Cir., 395 F.2d 261 (1968); *United States* v. *Certain Property etc.*, 344 F.2d 142 (1965); *United States* v. *Becktold Co.*, 8 Cir., 129 F.2d 473. However, as indicated in *Powelson*, supra, 319 U.S. at 279, the ultimate question of what is "property" within the just compensation clause of the Fifth Amendment is a federal question. And in *Nebraska* v. *United States*, 8 Cir., 164 F.2d 866, 868 (1947), this Court cautioned that a federal condemnation court does not necessarily accept "every local idiosyncracy or artificiality in a state's concepts of the incidents thereof."

Upon consideration we have concluded that under any body of applicable law the Pete boats cannot rationally or properly be characterized as real estate and that the District Court erred in so characterizing them.

A self-propelled boat whether an ocean liner, a Great Lakes freighter, or a cabin barge like those of the Petes, designed to navigate large bodies of water transporting thereon crew, passengers, and cargo is an almost complete antithesis to a "fixture." While any vessel in order to be used effectively perhaps must have a land base or home port, it does not follow that the vessel is in any sense "attached to" the base or port or is a part of it within the law of real property. And we think it a strained and impermissible analogy to equate the Pete boats with the various objects mentioned in the opinion of the District Court. Nor do we think that the Pete Boats are at all comparable to the dredge involved in *Colorado Gold Dredging Co.* v. *Starrus-Roger Manufacturing Co.*, 60 Colo. 412, 153 P. 765 (1915), a case which the District Court thought was analogous to this one.

If Tract 3520 had been the only piece of property on Basswood Lake condemned by the Government and if the rest of the shoreline had been left in private ownership, no one would contend for a moment that the condemnation included the boats. The Petes would simply have shifted their base of operations to another place on the Lake taking their boats with them or would have sold their boats to some other operator or operators.

It is true that the governmental actions in question deprived the Petes of the alternatives just mentioned, but that deprivation did not operate to attach the boats to Tract 3520. It is also true that it is not economically feasible to remove the boats from the Lake, but that lack of feasibility results from the nature of the construction, the size and dimensions of the boats, not from any attachment of them to real estate.

As the Government points out, what the Petes have really lost is their land and the business that they conducted with the land as a base. The boats were part of the business. They were not parts of the land, and the Petes are not entitled to compensation for them in this action.

II.

As heretofore noted, this Court in *United States* v. *Birnbach*, 8 Cir., 400 F.2d 378, had occasion to apply the teaching of *United States* v. *Rands*, supra, to a partial taking by the Government in connection with the Arkansas River Project for flood control and navigation. The taking affected the Birnbach lands that were on the river front, and the landowners claimed severance damages. In allowing such damages the District Court took into consideration the loss of riparian rights resulting from the taking. We held this to be error, saying (400 F.2d at 382):

"Generally, when part of a landowner's unit is taken, he is entitled to severance damages; in other words, the value is determined or 'just compensation' is measured by the difference between the fair and reasonable market value of the entire tract of land immediately before the taking and the fair and reasonable market value of the portion that remains after the taking. United States v. Miller, 1942, 317 U.S. 369, at 375-376, 63 S.Ct. 276, 87 L.Ed. 336; United States v. Grizzard, 1911, 219 U.S. 180, 183, 31 S.Ct. 162, 55 L.Ed. 165; United States v. Smith, 5 Cir., 1966, 355 F.2d 807, 809. When the taker is the government and the taking is for navigational purposes, however, one important distinction must be made so that the enhancement in value 'flowing' from a riparian location may not be recognized when the riparian character of the land is destroyed. The government, because of its constitutional power to control navigation (the Commerce Clause), has always had the right to the entire flow of a navigable body of water. These factors may not be taken into consideration as against the government, and thus it appears that the court in this case applied an improper standard in determining severance damages. See, United States v. Rands, 1967, 389 U.S. 121, 88 S.Ct. 265, 19 L.Ed. 2d 329; United States v. Virginia Electric & Power Co., 1961, 365 U.S. 624, 629, 81 S.Ct. 784, 5 L.Ed. 2d 838; United States v. Twin City Power Co., 1956, 350 U.S. 222, 76 S.Ct. 259, 100 L.Ed. 240; and United States v. Commodore Park, Inc., 1945, 324 U.S. 386, 390-391, 65 S.Ct. 803, 89 L.Ed. 1017."

The landowners argue here that the Government's dominant easement with respect to the navigable waters of this country is limited to situations in which the Government acts in aid of navigation or flood control, and that as far as environmental or ecological projects like the Boundary Waters Canoe Area are concerned no such easement exists. The landowners further contend that private

riparian rights in the Superior National Forest and in the Canoe Area have been expressly recognized and preserved in pertinent legislation dealing with the Forest and the Area.[7] And it is still further argued that at least as far as total takings are concerned, the rule of *Rands* has been repealed by section 111 of the Rivers and Harbors and Flood Control Act of 1970, which was made applicable to pending condemnation suits. Act of December 31, 1970, P.L. 91-611, 84 Stat. 1818.

The Government denies that its easement with respect to navigable waters is limited as argued by the landowners, denies that the Petes had any riparian rights on Basswood Lake that were superior to the Government's easement, and denies that the statute just mentioned has anything to do with this case. As indicated, the position of the Government is that the District Court erred not in applying *Rands* to the real estate proper but in refusing to apply it to the improvements as well.

We accept the landowners' argument based on section 111 of the Rivers and Harbors and Flood Control Act of 1970 and, therefore, find it unnecessary to evaluate their other arguments. Section 111 of the Act is as follows:

> "Sec. 111. In all cases where real property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, the compensation to be paid for real property taken by the United States above the normal high water mark of navigible waters of the United States shall be the fair market value of such real property based

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7 See footnote 1, supra.

upon all uses to which such real property may reasonably be put, including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters. In cases of partial takings of real property, no depreciation in the value of any remaining real property shall be recognized and no compensation shall be paid for any damages to such remaining real property which result from loss of or reduction of access from such remaining real property to such navigable waters because of the taking of real property or the purposes for which such real property is taken. The compensation defined herein shall apply to all acquisitions of real property after the date of enactment of this Act, and to the determination of just compensation in any condemnation suit pending on the date of enactment hereof."

The Act had not been adopted when the case was tried below, but in view of its express terms it must be recognized here if it applies to condemnations of land in connection with the Boundary Waters Canoe Area Project.

As we construe section 111, it is not limited to the particular projects authorized in other sections of the Act but extends to all acquisitions of land by the Government after the effective date of the Act and, as has been seen, to the determination of just compensation in all condemnation suits pending on the date of enactment.

The Government argues that the "improvements" of rivers, harbors, canals, and waterways referred to in section 111 are limited to "conventional" improvements such as the construction of locks and dams and projects for bank stabilization or for the stabilization or deepening of the channels of navigable streams. We disagree.

Regardless of the limitations to which the Government's powers with respect to navigable waters may be subject,

it is clear that those powers are broad, and that the public interests which those powers are designed to serve are also broad.

Those interests are not limited to the promotion and fostering of trade and commerce along and upon our waterways or to the control or prevention of destructive floods. They include, in our estimation, those interests which are aesthetic, ecological, and environmental as well as those which are economic and commercial.

We think that the Congress and the Executive Branch of the Government may properly conclude that the encroachment of civilization and commercial enterprise upon a wilderness area and the navigable waters found therein militates against the broad public interests that have been mentioned, and that when the Government commands civilization and business to retreat from a given area so that it may be preserved in its natural state for the enjoyment and refreshment of all of us, it may fairly be said that the Government is acting to "improve" the area and the waterways therein. We so hold.

Since the taking involved in this case was a total taking, we think that section 111 of the Act is applicable and should be followed upon a retrial of the case.

That means that the Pete lands and the fixed improvements thereon are to be valued as riparian lands and that their access to the Lake is to be taken into consideration in fixing their value as of January 20, 1966.

However, in making that valuation the District Court must give due regard in instructing the jury to the restrictions to which use of the property and of the Lake were in fact subject at the time of the taking. Those restrictions,

if any, should be given the same consideration as would have been given to them by reasonable men negotiating for the purchase of the unimproved 40-acre tract and for the purchase and sale of Government Lot 6 as enhanced by the fixed and permanent improvements thereon but without regard to the boats.

We do not undertake to define those restrictions. The District Court should have no difficulty in doing that by reference to the regulations and statutes that have been mentioned.

III.

The District Court dealt with the subject of rent in both its January and August, 1970, opinions. In the latter opinion the Court said:

> "The government's motion for rent must be denied. The court stated in its order of January 6, 1970 concerning this issue:
>
> > " 'The government has asked the court for an order deducting 7% per annum from the award for tract 3520Ce for rental value of the use of the Hoist Bay property since January 20, 1966, the commencement of the condemnation proceedings. The court heard no evidence on this matter, nor was any offered. The court has no idea of why, how or under what arrangement Petes have remained in possession to date except some vague hearsay knowledge that such has been by an arrangement with the United States Forestry Service. In any event, the court cannot grant such an order absent any evidence to form a basis therefor.'
>
> "No further evidence was adduced on this issue at the second trial, nor was the subject then mentioned

or argued. During 1970, the landowners have not been permitted to operate their resort business. At the argument on these motions the court inquired of the Assistant United States Attorney concerning the arrangement between the government and the landowners. He replied:

> "'MR. ANDERSON: Well, yes, I know what the people from the Forestry Service tell me, and if you want me to tell you that, I can.
>
> "'The Forestry Service tells me that, A, they wanted to cooperate with the Petes in connection with negotiating this thing out and they had hopes right up to the last minute that it wouldn't come to trial; and, B, they felt the boats were not compensable and they thought "He is not going to be compensated for these boats and we will let him use the site there and earn some money, which, in kind of approximate justice will compensate him for that."
>
> "'Frankly, I don't think the reason is relevant. He did use the land.
>
> "'THE COURT: And he did use the boats.
>
> "'MR. ANDERSON: He did use the boats and we have earned rent; and that is the essence of the argument, and I think the only defense is a contract by somebody authorized by the government to enter into it that rent was waived.'

"The Attorney for the landowners quite properly, it would seem, urges that if the court were to consider passing on the question of rent, it ought to hear evidence on the arrangements between the government and the landowners and all of the surrounding circumstances, correspondence and stipulations and not merely deduct an arbitrary sum from the jury's condemnation award based on the bare fact that the landowners have remained in possession for some time after the date of taking in January 1966."

We fully agree with the District Court that an award of rent on the basis of the record before it and without the landowners having had an opportunity to make proof on the subject would have been improper. Were we affirming the District Court on the other issues in the case, that would be the end of the rent controversy. But since we are remanding the case, the controversy may arise again.

The Declaration of Taking Act, 40 U.S.C.A., §258a, provides, among other things, that when a declaration of taking is filed, the court shall have the power to fix the time within which and the terms upon which the parties in possession of the property covered by the declaration shall be required to yield possession to the Government. And the court is given express power to "make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as may be just and equitable."

It is not unusual in cases of this kind for the condemnation court at the outset or at an early stage of the proceedings to make an order permitting the former owner of the property to remain in possession for a certain period of time and to prescribe the terms and conditions upon which he may remain in possession, which terms and conditions may include a requirement that the former owner pay rent, or maintain the premises, or keep them insured.

For example, a number of years ago Senior Circuit Judge Vogel while on the district bench permitted North Dakota farmers to remain in possession of their lands which had been condemned for dam and reservoir purposes during the 1948 crop year on condition that they pay reasonable and customary rentals for their lands.

United States v. 6576.27 Acres of Land in McLean County, N.D., D.C. N.D., 77 F.Supp. 244 (1948). More recently, Senior Judge Miller permitted a railroad company which had suffered a condemnation of part of its right of way to remain in possession after the taking at its own risk so long as its continued possession did not interfere with the prosecution of the Government's dam and reservoir project. *United States v. 27.7 Acres of Land in Carroll County, Arkansas*, W. D. Ark., 214 F.Supp. 707 (1963). Judge Miller said (p. 715 of 214 F.Supp.):

> "Often in cases where large areas are condemned for reservoir purposes, the courts permit property owners to retain possession of the property until the rise of impounded waters makes it necessary that they vacate when such possession on the part of the property owner does not in anywise interfere with the construction of the dam."

Where, as here, the condemnation court does not deal specifically with possessory problems and where the former owner simply remains in possession of the land and continues to use it, controversies between him and the condemning agency can and do arise at late stages of the proceedings, as happened in this case. Such controversies are dealt with rather extensively in an annotation appearing in 20 A.L.R. 3d 1164 et seq. following the text of the opinion in *State of Minnesota by Mondale, Attorney General v. Bohnen*, 273 Minn. 266, 140 N.W.2d 838, 20 A.L.R. 3d 1157 (1966).

In that case the State of Minnesota had condemned an office building in Ramsey County for use in connection with a trunk highway project; the owner of the building remained in possession for eleven months after the taking. The State was required to pay interest on the ultimate

award of just compensation to the owner and moved to offset against the total amount due the landowner the reasonable rental value of the property for the period during which the former owner continued in possession. The trial judge granted the offset finding in that connection that a reasonable rent for the building during the period in question was $2,500 per month. There was an appeal by the former owner.

The Minnesota Supreme Court held that the State was entitled to an offset for rent, but that the offset should be limited to the interest that the State was required to pay on the award. The Court also stated that the reasonable rental value of real estate is or tends to be less after condemnation than it was before condemnation, and that a proper determination of post-condemnation rent in an ordinary case requires "a separate assessment of it by witnesses who have taken into account the effect of the condemnation. The trier of fact should have the benefit of this evidence before a determination is made." (20 A.L.R. 3d at 1161.)

The rationale of *Bohnen* is that the condemnor's entitlement to an offset for rent arises from the fact that it is required to pay interest on all or part of the award, and it would be unjust to allow the landowner to receive the full value of his property plus interest without requiring him to discharge some liability for rent on account of his post-taking possession. And the same reasoning dictated the Court's conclusion that the amount of the offset should be limited to the amount of interest that the condemnor is required to pay. (20 A.L.R. 3d at 1161-1162.)

An examination of the annotation that has been mentioned indicates that there is a very sharp division among

the authorities which have dealt with the problem. Some courts do not allow an offset for rent. Some allow it but limit it to the amount of interest on the award. Still others allow it against the award itself. The cases relied by the Government fall within the third category just mentioned. *Certain Lands in the City of Washington v. United States*, C.A. D.C., 355 F.2d 823 (1965); *United States v. Certain Interests in Property in the Borough of Brooklyn*, 2 Cir., 326 F.2d 109 (1963), in which the Court described its earlier holding as being to the effect that "the United States was entitled to the rental value of the premises from the date of taking, when title vested in the government, to the date when the government was awarded possession." 326 F.2d at 112, fn. 1.

This Court seems to have had no occasion to consider the question, and with the instant case in its present status we deem it undesirable to commit ourselves at this time to any of the three rules that have been applied in other Circuits and in the State courts. If in the course of the remand which is to be ordered the Government desires to renew its demand for rent it should do so promptly; the matter should be adequately developed, and appropriate findings should be made. If either side is dissatisfied with the District Court's ultimate ruling on the question of rent, the question can be brought to this Court again.

IV.

At the close of the evidence in the second trial counsel for the Government tendered 33 requests for instructions, and the landowners tendered five requests. The instructions actually given by the Court cover 27 pages of the Appendix before this Court.

The Government contends that the District Court erred in refusing certain of its requests. One or more of those requests dealing with depreciation on the boats have become moot since we are taking the boats out of the case. As to the others, it appears to us that to the extent that they stated the law correctly their subject matter was covered adequately by the comprehensive charge that the Court in fact gave to the jury.

Reversed and Remanded.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B: DENIAL OF PETITION FOR REHEARING BY THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1970

No. 20709
UNITED STATES OF AMERICA,
Appellant,

vs.

967.905 ACRES OF LAND, etc.
JACOB L. PETE, et al.,
Appellees.

No. 20710
UNITED STATES OF AMERICA,
Appellee,

vs.

967.905 ACRES OF LAND, etc.
JACOB L. PETE, et al.,
Appellants.

Appeals from the United States District Court
for the District of Minnesota

On motion of counsel for appellees-cross-appellants, it is now here ordered that Jacob L. Pete and James W. Pete may have to and including September 15, 1971, in which to file petition for rehearing.

September 7, 1971

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1971

No. 20709

UNITED STATES OF AMERICA,

Appellant,

vs.

967.905 ACRES OF LAND, etc.
JACOB L. PETE, et al.,

Appellees;

No. 20710

UNITED STATES OF AMERICA,

Appellee,

vs.

967.905 ACRES OF LAND, etc.
JACOB L. PETE, et al.,

Appellants.

Appeal from the United States District Court
for the District of Minnesota

Petition of appellees-appellants Jacob L. Pete and James W. Pete for rehearing filed in these causes having been considered, it is now here ordered by the Court that the same be, and it is hereby, denied.

September 23, 1971

APPENDIX C: MODIFICATION OF THE OPINION OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1971

No. 20709-10

UNITED STATES OF AMERICA,
Appellant and Cross-Appellee,

vs.

967.905 ACRES OF LAND, more or less, situate in Cook, Lake and St. Louis Counties, State of Minnesota, et al., JACOB L. PETE and JAMES W. PETE,
Appellants and Cross-Appellants.

Appeals from the United States District Court
for the District of Minnesota

On consideration of request of counsel for the United States of America regarding modification of the opinion of this Court filed in this cause on August 25, 1971, it is now here ordered that the opinion be modified by changing the period at the end of the last paragraph on page 6 of the printed opinion to a semicolon—and add "the 40-acre valuation is not at issue in this appeal".

And on page 15 of the printed opinion, all of line 3 thereof will be deleted except for the first word "for".

October 1, 1971

APPENDIX D: NOTICE OF ENTRY OF JUDGMENT

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MINNESOTA
FIFTH DIVISION

No. 5-66 - 6 Civil

UNITED STATES OF AMERICA

Plaintiff,

vs.

967.905 ACRES OF LAND, more or less, situate in Cook, Lake, and St. Louis Counties, State of Minnesota, et al., JACOB L. PETE and JAMES W. PETE,

Defendants.

Clerk's Notice under F.R.C.P. Rule 77d

You are hereby notified that in the above entitled cause, on the 29th day of October, 1971, the Judgment from the United States Court of Appeals for the Eighth Circuit was filed per the attached copy of the same and Judgment pursuant to the same entered October 29, 1971.

HARRY A. SIEBEN, Clerk
By Irya Tahtinen, Deputy Clerk

To: Mr. Robert G. Renner
United States Attorney
596 United States Courthouse
Minneapolis, Minnesota 55401

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Jacob L. Pete and James W. Pete

APPENDIX E: JUDGMENT OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JUDGMENT
UNITED STATES COURT OF APPEALS

No. 20709

UNITED STATES OF AMERICA,

Appellant,

vs.

967.905 ACRES OF LAND, more or less, situate in Cook, Lake and St. Louis Counties, State of Minnesota; JACOB L. PETE and JAMES W. PETE,

Appellees.

No. 20710

UNITED STATES OF AMERICA,

Appellee,

vs.

967.905 ACRES OF LAND, more or less, situate in Cook, Lake and St. Louis Counties, State of Minnesota; JACOB L. PETE and JAMES W. PETE,

Appellants.

Appeals from the United States District Court for the District of Minnesota

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These causes came on to be heard on the record from the United States District Court for the District of Minnesota and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in these causes be, and the same is hereby, reversed.

And it is further ordered by this Court that these causes be, and are hereby, remanded to the said District Court for proceedings consistent with the opinion of this Court this day filed herein.'

August 25, 1971

Filed October 29, 1971.

Harry A. Sieben, Clerk, by Irya Tahtinen, Deputy

Let the Judgment be filed and entered accordingly.

Philip Neville, Judge, U.S. District Court

Dated: October 27, 1971

A true copy.

Attest: Robert C. Tucker, Clerk, U.S. Court of Appeals, 8th Circuit, by W. F. Grumeyer, Chief Deputy

October 21, 1971

APPENDIX F: DECISION OF THE DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,
Plaintiff,
vs.
967.905 ACRES OF LAND, more or less, situate in Cook et al. Counties, State of Minnesota, et al.

Claim of Jacob Pete and James Pete, Landowners, as to Tracts No. 3520Cc and 4098

No. 5–66 Civ. 6

United States District Court.
D. Minnesota - Fifth Division
Sept. 11, 1969

Eminent domain proceeding. The District Court, Neville, J., held that condemnees were entitled on taking of their realty bordering lake to judgment which included value of three cabin barges which were used in operation of condemnees' business for fishing while remaining on lake for several days and which could not be practically removed from condemned realty and were peculiarly adapted to condemnee's operation.

Judgment for condemnees.

If machinery, fixtures and equipment form a part of the realty and tend to enhance its value, they are included within taking when underlying fee interest is condemned by United States. U.S.C.A. Const. Amend. 5.

A federal court normally will apply state concepts of real property law in determining what comes within a federal taking.

Under Minnesota law, personal property will be considered part of realty if it can be termed a fixture.

Under Minnesota law to find constructive annexation of a chattel to land so as to constitute a fixture, chattel must be essential to landowner's use of real property and chattel must be attached to realty in some way or must be a component part of erection, structure or machine which is attached to freehold and without which erection, structure or machine would be imperfect or incomplete.

Under Minnesota law, lack of removability is a pertinent factual consideration in determining whether chattel is a fixture.

Cabin barges that were not physically annexed to condemned realty except occasionally by mooring lines and that could not practically be moved out from condemnees' realty and that were peculiarly adapted solely to condemnees' operation in connection with fishing while remaining on lake for several days were "fixtures" under Minnesota law and constituted part of condemned realty, and condemnees were entitled to just compensation for value of barges.

Fact that cabin boats did not ply waters wholly owned by condemnees did not prevent their classification as fixtures or condemnees' entitlement to value of boats on taking of realty.

Fact that cabin boats used in condemnees' operation were operated and used on border waters subject to regulation by treaty between United States and Canada did not make boats non-compensable on taking by United States of condemnee's realty in connection with which the boats were used.

Government's right to exclude all persons from navigable water would not render taking of cabin barges which condemnees used on navigable waters non-compensable on government's taking of condemnees' realty.

Issues as to whether business has been lost or taken relates at best to amount or measure of compensation and not to fact of whether taking should go uncompensated.

Where only a portion of a tract of realty is condemned but remaining part is rendered inaccessible or otherwise destroyed or seriously impaired in value, a landowner is entitled to monetary award for taking of residue though it is not included in description of what is taken by condemnor.

Condemnees had right to possess, use, sell and employ cabin barges for commercial advantage in conformance with lawful governmental regulations in their business of fishing while remaining on lake for several days and therefore had "property" therein protected by Fifth Amendment providing for just compensation. U.S.C.A. Const. Amend. 5.

If damage or interference with use of property is substantial and direct and immediate, there has been a taking compensable under protection of Fifth Amendment. U.S.C.A. Amend. 5.

Where United States condemned all land surrounding lake on which condemnees' realty bordered and on which they used cabin barges in question and where United States prohibited use of gasoline powered engines on lake and condemnees could not thereafter utilize gasoline engines to propel the boats or use boats for any commercially advantageous purpose such as for fishing while remaining on lake for several days, United States' interference constituted a "taking" within meaning of Fifth Amendment protecting right to compensation. U.S.C.A. Const. Amend. 5.

Generally, there is no compensation for personal property or cost of removing personal property when land is condemned.

Where governmental activity produces circumstances under which property cannot be removed without physically destroying it or where only reasonable alternative to owner is abandonment, such activity constitutes a "taking" within meaning of Fifth Amendment protecting right to compensation. U.S.C.A. Const. Amend. 5.

District courts have concurrent jurisdiction with Court of Claims but only as to civil actions or claims against United States not exceeding $10,000. 28 U.S.C.A. §§ 1346(a) (2), 1491(1).

Condemnees were entitled on taking of their realty bordering lake to judgment which included value of three cabin barges which were used in operation of condemnees' business for fishing while remaining on lake for several days and which could not be practically removed from condemned realty and were peculiarly adapted to condemnees' operation. U.S.C.A. Const. Amend. 5.

Robins, Davis & Lyons, by Solly Robins and Steven H. Goldberg, St. Paul, Minn., for defendants.

Ralph E. Koenig, Asst. U. S. Atty., Minneapolis, Minn., and Carl Strass, U. S. Dept. of Justice, Washington, D. C., for plaintiff.

NEVILLE, District Judge.

This eminent domain proceeding, commenced January 20, 1966 presents a fact situation characterized by the landowners' counsel as unique if not in fact sui generis. Such seems to be true, at least to the extent that neither counsel have been able to furnish the court with any prior decisions or authorities

involving similar facts. The issue, simply stated, is whether certain property is included in the "taking" effected by the Federal government's condemnation action.

The United States, in cooperation with the Dominion of Canada, established a wilderness area under the authority found in the Wilderness Act passed by Congress in 1964, 16 U.S.C. § 1131 et seq. The area lies along the international boundary between the United States and Canada and is partly in northern Minnesota. This has been named The Boundary Waters Canoe Area and encompasses some four million acres. It includes numerous sizeable lakes and chains of lakes, linked to each other in many instances by rapids, rivers or creeks. The area is dedicated to perpetual wilderness and no commercial activities may be carried on within its boundaries. With minor exceptions, private permanent structures are prohibited, no mechanical portages are permitted, and no resorts or public hostelries may exist. None but handpowered boats are allowed except on certain restricted routes. The area is designed to remain substantially roadless, and entering the area by airplane is banned. It is one of the last remaining areas of its kind in North America and attracts Boy Scouts, campers, sportsmen, Izaak Walton League members and others from the entire United States and Canada, usually for several-day to several-week canoe trips, fishing outings, etc.

Consonant with this objective, the United States condemned all the privately owned property in The Boundary Waters Canoe Area, including two separate tracts, one owned by Jacob Pete alone, and in the other of which Jacob Pete and his son James Pete own undivided interests with persons who are not parties here.

Some 35 years ago, more or less, Jacob Pete acquired a one-fourth interest in real property known in this proceeding as

the Hoist Bay Property on Basswood Lake, comprising approximately 12 acres of fast land, of which four acres are on high ground with the remaining eight acres presently devoted to wild rice beds. He acquired also a 40 acre tract not on the lakeshore but on a portage to the Hoist Bay property, which tract the government has included with the Hoist Bay property as part of parcel #3520Cc in the condemnation proceedings.[1]

Over the years Jacob Pete, who later conveyed a partial interest to his son James, erected on the Hoist Bay property a main cabin 18 by 24 feet with an annex, a storage building or tool shed, a lumber shed, an ice house, a gasoline house, a service dock, a boat landing area, other miscellaneous improvements, and a device with heavy steel rails analogous to a railroad track running from shore into the lake used in conjunction with a motor or tugger to pull heavy boats out of the water. He conceived the idea of building what he has called cabin barges or cabin boats. These are rather large and ponderous with a two-story or two-deck superstructure which can sleep 12 people or more in bunks. The first deck includes an open area for eating and recreation, and provides space for a kitchen and equipment for the boat. At the time of the institution of the condemnation proceedings the Petes had three such boats in service on Basswood Lake. Two others had previously been hauled up on shore and rough foundations built under them. They were used as cabins. Another such boat was situate on the steel rails, apparently having been hauled up for repairs but which were never made following the institution of these condemnation proceedings. Though the Petes owned but a one-fourth interest in the realty, it is admitted that they had the entire ownership of the improvements thereon.

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[1] There is some variance between this loose description and the exact legal description specified in the condemnation proceedings, but such is not material for the present purpose.

Petes' customers motor or fly to Ely, Minnesota and from thence drive a short distance to Winton, Minnesota where on a dock owned by the Petes they board a launch and are transported several miles across Fall Lake to a dock which is on one end of what is known as the four-mile portage. The four-mile portage is over land, including the 40 acre tract in which Petes have an undivided interest, and is accomplished by vehicular transportation presently in the form of an old school bus on a revitalized logging road to Basswood Lake and thus to the Petes' Hoist Bay place. A customer may, after the portage, board one of the cabin barges. These are motorized and are taken out into Basswood Lake for a period usually of several days. Two or more smaller rowboats which are used for fishing excursions generally are trailed behind the cabin barges. The Petes furnish a cook and the supplies for the boats. The 12 acre piece is referred to by the government as a base for this operation.

The cabin barges in service are steel-hulled and are estimated by witnesses to weigh between 25 and 40 tons. The government does not gainsay that the former boats which prior to the condemnation date had been brought up and put on foundations on the land, and thereafter used by fishermen and tourists as cabins are included in the "taking." The government's principal contention is that the three boats which are in service and afloat on Basswood Lake are personal property and not fixtures, and therefore are not included within the "taking" and so should not be considered in the awarding of just compensation.

From the evidence, the court is convinced that it is not possible to float the three boats out of, nor feasibly to remove them by any other means from, Basswood Lake short of nearly complete dismantling. The water inlets to, and the outlet from,

Basswood Lake involve rapids and a difference in elevation of some 20 to 30 feet. Canoeists portage on land around these. The overland four-mile portage from Fall Lake is a narrow, rough road originally a logging road which at the request of the Government was viewed by the court, counsel and all jurors who traversed it to the Hoist Bay property. It is heavily lined with trees, many of them second growth. It has a wooden bridge in at least one place and on the particular branch road to Jacob Pete's property it has been cut through rocks which are close on both sides. A continuation of the portage road before the Pete branch off is not quite as narrow as the branch but does not differ materially from the remainder of the portage road. The testimony is, and such was observed by the court on the viewing, that to transport the boats out, even in wintertime so they could be brought over hard ground and then across the ice on Fall Lake to Winton would involve the cutting of perhaps hundreds of trees on the four-mile portage, would require the rebuilding or reinforcement of the wooden bridge and perhaps even the blasting of some rock. Further, the road passes through some low marshy spots and the testimony is that such ponderous objects would become mired, though wintertime frozen ground might obviate this if the snow would permit of movement. The court is convinced from his own observation that moving the boats out is a practical impossibility.

The testimony is that the boats were built on the premises; that the first steel hull was fabricated off the premises at a boatworks, but such difficulty was incurred in attempting to transport the hull to Hoist Bay that it had to be cut with a steel torch in part in order to reduce its size and then it was necessary to reweld it on the premises. The court believes that with the difficulty incurred just with the hull, the boats with

their present superstructure would present an insoluble moving problem. The other boats were built by having the steel plates brought to the premises and fabricated there by steelworkers. The superstructure was then built as to all boats by carpenters, plumbers, electricians, etc. at Hoist Bay. The boats are licensed and approved by the United States Coast Guard as seaworthy and the Petes operate under a hotel and motel license from the State of Minnesota.

There was uncontradicted testimony by a mover of heavy machinery and equipment as to the practical impossibility of moving the boats across the four-mile portage and uncontroverted evidence given by two boat manufacturers that to dismantle the boats and transport them broken down, even assuming the hulls could by proper blow-torch cutting be moved out, would completely destroy their value and the cost to rebuild them somewhere else would be as much as to start anew.

Counsel for the landowner points out that the boats are peculiarly adapted solely to Petes' operation and have no value otherwise. He attempts to make some point of the fact that on the actual date the government filed its condemnation proceeding, i.e., January 20, 1966, it was in the dead of winter and two of the boats had been hauled up out of the water and were thus on the land, annexed by gravity and the third was in a slip which the landowner had entrenched into his own premises and was frozen in the ice. He claims that the boats are analogous to fixtures and therefor should be included within the government's "taking."

The government stoutly resists this contention. It admits it should pay for the land and the improvements thereon, including the two former boats now on foundations and used as cabins. Under the case of United States v. Rands, 389 U.S. 121, 88 S. Ct. 265, 19 L. Ed. 2d 329 (1967), and other authori-

ties the government contends that the jury should not be permitted to place a value on the land as a port site. It further argues most strenuously that under any traditional legal definition these boats which are moveable cannot be said to be fixtures. The government does not seriously contend that they could be transported to any other lake nor does it dispute the fact that if dismantled and rebuilt the cost would be the equivalent of a new boat. The government attempts to argue that the landowner can still use the boats after the condemnation; that he will have the same rights as anyone to come into the area with canoe or non-motorized boat and if he can find a place to land the big boats he will be able to board them.[2] It is clear he will not be able to carry on a commercial operation or rent them out nor charge people for their use and from this the government argues that in reality by claiming a value for these boats the landowner is claiming a business loss which the government does not condemn nor take.

Government counsel at one time argued that conceivably the landowners might have or might have had if the Statute of Limitations has not run, some action in the Court of Claims under the Tucker Act, 28 U.S.C. § 1491, for an incidental or indirect taking, but continued to hold to the view that the boats are not "taken" in this particular proceedings. This will be discussed hereinafter.

[1] The Fifth Amendment to the United States Constitution requires payment of just compensation when the United States Government takes private property for a public use.

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[2] This contention seems questionable in view of Regulations of the Secretary of Agriculture (Defendants' Exhibit 15) which provide in part:

> "No amphibious craft of any type and no watercraft designed for or used as floating living quarters shall be moored to, used on, or transported over national forest land."

It long has been established that if machinery, fixtures, and equipment form a part of the realty and tend to enhance its value, such are included within the taking when the underlying fee interest is condemned by the United States. United States v. Becktold Realty Co., 129 F. 2d 473 (8th Cir. 1942). In the *Becktold* case the government had condemned certain land in Missouri on which was situate a bookbinding plant. It was the contention of the government that it was liable to compensate the owner only for the value of the land and building, but not for the plant machinery utilized in the building. The lower court found that the owner was entitled to compensation for the machinery. On appeal, the Court of Appeals affirmed the award and set forth the controlling test of compensability:

> "If the machinery, fixtures, and equipment in this building *formed a part of the realty* and *tended to enhance the value of the realty*, then it was being taken by the Government the same as the building on the lot described was being taken." [Emphasis added.]

Applying this principle to the instant case, there is no doubt that the cabin barges *enhanced the value of the realty* when considered as a part thereof. The jury found that the realty valued with the boats as a part thereof was worth $149,000. Without the boats as a part of the realty, the jury valued the owners' compensation at $64,000.

[2] As to the further question of whether the machinery and fixtures *constituted a part of the realty*, the court in *Becktold* indicated that the issue must be resolved by reference to the law of Missouri, the state in which the condemned land was situate. A federal court normally will apply state concepts of real property law in determining what comes within a fed-

eral taking. United States v. Powelson, 319 U.S. 266, 279, 63 S. Ct. 1047, 1054, 87 L. Ed. 1390 (1943); United States v. Certain Property, etc., 344 F. 2d 142 (2d Cir. 1965); State of California v. United States, 395 F. 2d 261, 264 (9th Cir. 1968). Whether or not the cabin barges constituted a part of the realty and thus are within the taking is dependent as both parties seem to agree upon the law of the State of Minnesota, the place in which the condemned land is situate.

[3] Under Minnesota law personal property will be considered part of the realty if it can be termed a fixture. Wolford v. Baxter, 33 Minn. 12, 21 N.W. 744 (1844), is the basis of a long line of cases establishing the Minnesota law of fixtures. In *Wolford*, the court indicated that there is no precise or fixed rule for determining what constitutes a fixture and that each case must be decided on its own particular facts. Certain helpful but non-conclusive tests have been developed.

Particular apposite in this case is the language in *Wolford* as follows:

> "*While not agreeing as to the necessity for, or the degree of importance to be attached to, the fact of actual physical annexation,* yet the authorities generally unite in holding that, to constitute a fixture, the thing must be of an accessory character, and must be in some way in actual or *constructive* union with the principal subject [land], and not merely brought upon it; that in determining whether the article is personal property, or has become a part of the realty, there should be considered the fact and character of annexation, the nature of the thing annexed, the adaptability of the thing to the use of the land, the intent of the party in making the annexation, the end sought by the annexation, and the relation of the party making it to the freehold. * * *

> A thing may be said to be constructively attached where it has been annexed, but is separated for a temporary purpose, as in the case of a millstone removed for the purpose of being dressed, or where the thing, although never physically fixed, is an essential part of something which is fixed; *as in the case of keys to a door, or the loose cover of a kettle set in brick-work.* It is, perhaps, somewhat on this principle that the permanent and stationary machinery in a structure erected especially for a particular kind of of manufacturing has been held fixtures, although very slightly or not all physically connected with the building; because, without it, the structure would not be complete for the purpose for which it was erected. * * *" [Emphasis added.] 33 Minn. at 17-18, 21 N.W. at 745.

Applying these rules and tests to the facts in the present controversy, the cabin barges must properly be characterized as fixtures. Although the boats were not physically annexed to the condemned realty except occasionally by mooring lines, they were of the nature to be deemed constructively annexed to the land. Similarly, screens and storm windows on a house, though readily removable and half of which are detached at any one time are fixtures having no value apart from the house itself and being capable only of an integrated use with the house.

[4] Under *Wolford* the doctrine of constructive annexation has two essential requisites. First, that the chattel must be essential to the landowner's use of the real property. The cabin barges here are the very essence of that use. The Petes are engaged in providing mobile accommodations and fishing facilities on Basswood Lake with the floating cabin barges.

The second requirement of a constructive annexation is that the chattel:

> "* * * must be attached to it [the realty] in some way, or, at least, it must be mechanically fitted so as, in ordinary understanding, to constitute a part of the structure itself. It must be permanently attached to, or the *component part* of, some erection, structure, or machine which is attached to the freehold, and *without which the erection, structure, or machine would be imperfect or incomplete*." [Emphasis added.] 33 Minn. at 18, 21 N.W. at 745.

[5] The cabin barges are not permanently and physically attached to the land, but they have a unity of use with the land, the docks, the spur track, the equipment in the sheds, and the sheds themselves, all of which the government admits are compensable fixtures. The boats, the land, and the structures on the land are inextricably bound together both in terms of physical proximity and commercial purpose. The boats were constructed on the land. It was the clear intention of the Petes that the boats should remain in Basswood Lake as accessories for permanent use in connection with the land. Lack of removability is a pertinent factual consideration in determining whether a chattel is a fixture. See Behrens v. Kruse, 121 Minn. 90, 140 N.W. 339 (1913). An analogous case here is Colorado Gold Dredging Co. v. Stearns-Roger Mfg. Co., 60 Colo. 412, 153 P. 765 (1915). There the court found constructive annexation of a dredge and declared it a fixture, stating:

> "It was floated in an artificial pond from one side or end of which it took sand, gravel and rocks which, after being washed, were deposited at the rear of the dredge which moved forward as the work progressed. Had the dredge been actually fixed to the land and immovable the use for which it was intended would not have been possible. That such structure was intended for the permanent working

of the deposit and not for mere temporary use cannot be doubted. It was an improvement 'of and upon' the gold bearing deposit essential to working it and as much a part of it as a mill on a load claim."

[6] Considering the fact of constructive annexation, the unity of use with the land, the nature and accessorial character of the cabin barges, and all other relevant facts and circumstances, it is the opinion of this court that the floating cabin barges are fixtures or the equivalent thereof under Minnesota law. Because the cabin barges constitute part of the condemned realty and enhance the value of the land to which they are constructively annexed, the defendant is entitled to just compensation for their value.

[7] The government argues that the mobile cabin barges cannot be fixtures because they are similar to railroad rolling stock which has been held not to be a fixture. Williamson v. New Jersey Southern R.R., 29 N.J. Eq. 311 (1878); Nelson, Benton & O'Donnell v. Iowa Eastern R.R., 51 Iowa 184, 1 N.W. 434 (1879). This analogy is not convincing. Railroad rolling stock has a substantially more extensive range of mobility, it is easily removable from condemned land, and its connection in terms of time and space with a particular parcel of condemned realty is manifestly less direct. The fact that the cabin boats do not ply waters wholly owned by the defendants is likewise not controlling.

[8] The government urges that the cabin barges are not compensable because they were operated and used on border waters subject to regulation by a treaty between the United States and Canada. The fact that a treaty is involved seems irrelevant to the question of compensation. The Petes do not question the power of the federal government to condemn their

land nor to take their boats. The government clearly has such power under the circumstances of this case. The Petes are concerned only with the legal consequences that attach once that power has been exercised.

[9] The government also relies on Southern Counties Gas Co. v. United States, 157 F. Supp. 934, 141 Ct. Cl. 28 (1958). The court is not convinced by this case, if it can be said to be analogous. Cf. United States v. 25.4 Acres of Land, 71 F. Supp. 248 (E.D.N.Y. 1947), rev'd on other grounds sub nom. United States v. Brooklyn Union Gas Co., 168 F. 2d 391 (2d Cir. 1948). The government further urges that it has the right to exclude all persons from navigable waters and that the consequent loss of use of navigable water by the Petes as riparian owners is not compensable. Clearly such is the law. United States v. Rands, 389 U.S. 121, 88 S. Ct. 265, 19 L. Ed. 2d 329 (1967); United States v. Birnbach, 400 F. 2d 378 (8th Cir. 1968). What the landowners here are seeking however and which this court is allowing is the value of the tangible property taken, i.e., the boats, and not the value attributable to the Petes' present or future right to ply navigable waters. While these and other cases may affect or determine the measure or amount of compensation, they are not determinative as to the fact of compensation nor as to the question of whether there has been a taking.

[10] Similarly the issue as to whether a business has been lost or taken relates at best to the amount or measure of compensation, not the fact of whether the taking of tangible property should go uncompensated. The question of the amount of compensation of course differs from the question of entitlement to compensation.

[11] The principle the court is applying and the finding herein made seems to the court to be analogous to the doctrine

of severance damage. It has been held over and over again that where only a portion of a tract of realty is condemned but the remaining part is rendered inaccessible or otherwise its value is destroyed or seriously impaired a landowner is entitled to a monetary award for the taking of the residue even though such is not included in the description of what is taken by the condemnor. 29A C.J.S. Eminent Domain § 139 (cases cited); 27 Am. Jur. 2d § 310 (cases cited); 95 A.L.R. 2d 887; United States v. Benning, 330 F. 2d 527, 533-534 (9th Cir. 1964). So here, the Petes' real property is condemned according to the description of tract 3520Cc in the proceedings but the three boats are attempted to be excluded from the declaration of taking. In light of the facts of this case, it seems clear to the court that the application of the severance doctrine is apt. Accordingly, the Petes are entitled to recover compensation, whether or not techincally called severance damages, to the extent of their entire property interest, including the three boats, resulting from the condemnation of tract 3520Cc. It should be noted that the court is not now in this opinion considering questions of valuation or proper measure of compensation, but merely the landowners' *right* to compensation.

[12] The facts of this case suggest a further argument. The Fifth Amendment reads in part: "nor shall private property be taken for public use, without just compensation." In the landmark case of United States v. General Motors Corp., 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311 (1944), the Supreme Court defined the scope and meaning of this constitutional provision. The critical terms are "property," "taken" and "just compensation." "Property" the Court said was:

> "* * * the group of rights inhering in the citizens relation to the physical thing, as the right to possess, use and

> dispose of it * * *. The constitutional provision is addressed to every sort of interest the citizen may possess."

The Petes in the present case had various property rights inherent in their ownership of the three floating cabin barges. They had the rights *inter alia*, to possess, use, sell, and employ the boats for commercial advantage in conformance with lawful governmental regulations. In short, the Petes by virtue of their ownership interest had "property" and rights therein protected by the Fifth Amendment.

The Court in *General Motors* in discussing the concept of "taken" stated:

> "In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its *effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking*." [Emphasis added.]

This broad language was further elaborated and delimited in United States v. Causby, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946). *Causby* involved a suit in the Court of Claims against the United States to recover for an alleged taking by the government of plaintiff's home and chicken farm which was adjacent to a municipal airport leased to the government. The taking was said to occur as a result of airplane flights so low and so frequent over plaintiff's land as to be a direct and

immediate interference with the use and enjoyment of the land. As many as 150 chickens were killed when they flew into walls from fright. The value of the property was significantly depreciated. In effect, the result of the governmental activity was the destruction of the use of the property as a commercial chicken farm. The Supreme Court held that these facts were sufficient to constitute a "taking" under the Fifth Amendment. The taking was in the nature of an easement of flight, which if found to be permanent, would be the equivalent to taking the entire fee interest.

[13] In *Causby*, the Court was concerned with the nature of the plaintiff's interest in the property and the extent to which governmental action interfered with that interest. Substance and not mere form was controlling. The owner's right to possess and exploit the land and other incidents of his beneficial ownership had been destroyed. It was the character of the invasion that was determinative. If the damage or interference with the use of the property is "substantial" and "direct and immediate," that determines whether there has been a taking. See also United States v. Cress, 243 U.S. 316, 328, 37 S. Ct. 380, 385, 61 L. Ed. 746 (1917).

[14] Relating these principles to the facts in the present controversy, it would appear that the total array of governmental activity in the Basswood Lake region constitutes a "taking" of defendants' cabin barges. The United States Government has condemned all land surrounding Basswood Lake and prohibited the use of gasoline powered engines on the lake. Defendants cannot land their boats on shore for purposes of repair or storage, they cannot utilize the gasoline engines to propel the boats, and they cannot use the boats for any commercially advantageous purpose. Such a situation constitutes

a substantial, direct and immediate interference with the defendants' use and enjoyment of the boats and is, therefore, a taking within the meaning of the Fifth Amendment.

In the instant case, the utility of the boats as property has been effectively destroyed. The right to drift aimlessly in a landlocked lake is the equivalent of no right at all. Removal is impossible. Governmental action which interferes so extensively with an owner's rights in his property is a "taking" within the meaning of the Fifth Amendment.

[15, 16] It is of course the general rule that there is no compensation for personal property or the cost of removing personal property when land is condemned. United States v. General Motors Corp., 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed 311 (1944); Sykes v. United States, 392 F. 2d 735 (8 Cir. 1968). The theory underlying this principle is that property has not been "taken" because the property is readily severable and removable from the condemned land. But where governmental activity as under the facts of this case produces circumstances under which property cannot be removed without physically destroying the same or where the only reasonable alternative open to the owner is abandonment, such activity constitutes a "taking" within the meaning of the Fifth Amendment.

Although the court believes that the Petes are entitled to just compensation for the taking of the boats under the rationale of the *Causby* and *General Motors* cases, it seems clear that this court has no subject matter jurisdiction to make a complete award of compensation on that basis. The present litigation is concerned only with that aspect of governmental activity condemning specific parcels of realty owned by the Petes.

[17] The claim for compensation based on *Causby* and *General Motors* is in the nature of a claim against the United States, founded on the Fifth Amendment and as such is within the subject matter jurisdiction of the Court of Claims pursuant to 28 U.S.C. § 1491(1). Although this court as a federal district court has concurrent jurisdiction with the Court of Claims, such extends only to civil actions or claims against the United States *not exceeding $10,000.* 28 U.S.C. § 1346(a)(2).[3] This jurisdictional limitation has been rigorously applied in the federal courts. Blanchard v. St. Paul Fire & Marine Ins. Co., 341 F. 2d 351, 358 (5th Cir. 1965), cert. denied, 382 U.S. 829, 86 S. Ct. 66, 15 L. Ed. 2d 73 (1965); Drake v. Treadwell Construction Co., 299 F. 2d 789, 791 (3d Cir. 1962); Ove Gustavsson Contracting Co., Inc. v. Floete, 278 F. 2d 912, 914 (2 Cir.), cert. denied, 364 U.S. 894, 81 S. Ct. 225, 5 L. Ed. 2d 188 (1960). On the basis of the landowners' claim and the jury verdict in the instant case, it is clear that the three boats, regardless of the method of valuation, involved more than $10,000. This somewhat lengthy discussion of the *Causby* and *General Motors* cases has been undertaken to attempt to provide additional doctrinal perspective to a case which appears to be sui generis.

[18] The present posture of the case is that the court at the trial concluded it should receive evidence as to the three boats in order intelligently to rule on the question as to whether they were or were not fixtures. A motion in the nature of summary judgment had been previously made by the government and

[3] The American Law Institute in a 1968 study has recommended that the subject matter jurisdiction of federal district courts be expanded in cases where the United States is a party. Field, Jurisdiction of Federal Courts, A Summary of American Law Institute Proposals, 46 F.R.D. 141, 150 (1969) (Proposed §§ 1321, 1322).

denied by the court. Anticipating an appeal in either event, the court, as to the Hoist Bay tract #3520Cc, submitted alternate forms of verdict to the jury asking them to find the fair and reasonable market value of the property without the boats and the fair and reasonable market value with the boats. The jury returned a verdict of $64,000 without the boats and $149,000 with the boats thereby attributing a value of $85,000 to the boats. The clerk of court was unable to enter judgment on these alternative verdicts and the court instructed the clerk that subsequently it would make an order directing the entry of judgment. Before the court now then is solely the question of which verdict the clerk should use in entering judgment. The court is not now passing on the question of errors allegedly committed at the trial, valuations, the validity or weight to be given evidence which was received, the question of the reasonableness or unreasonableness of the amount of the verdicts, or any other similar questions, but merely is directing the clerk in regard to the entry of judgment, after which both parties may present the court with such motions as they deem appropriate. A separate order is entered directing the entry of judgment as to the tract 3520Cc in the amount of $149,000.

The separate tract of land in South Farm Lake included in the government condemnation as tract #4098 lies many miles from the Hoist Bay property and consists of a peninsula and three islands with no improvements thereon. This was solely owned by Jacob Pete and the jury returned a verdict of $56,000. Without ruling on the reasonableness, validity or legality of this award, the court is directing the clerk to enter judgment as to this tract on the jury's verdict of $56,000.

APPENDIX G: REAFFIRMATION OF THE OPINION OF THE DISTRICT COURT FOR THE DISTRICT OF MINNESOTA*

VOLUME III
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

5-66 Civil 6

UNITED STATES OF AMERICA,

Plaintiff,

vs.

967.905 ACRES OF LAND, more or less, situate in Cook, Lake, and St. Louis Counties, State of Minnesota, et al.,

Defendants.

The above-entitled matter came on for trial before the Honorable Philip Neville, one of the Judges of the above Court, and a jury, at Duluth, Minnesota, on June 15, 1970.

The following contains the proceedings of June 17, 1970.

Appearances: Thorwald H. Anderson and Carl Strass, appearing for the Government; Solly Robins, Steven Goldberg, and Herschel Fryberger, appearing for Defendants Jacob L. Pete and James W. Pete.

* * * * *

So the Court considers that it has before it an issue of fact based on the prior record and based on the evidence that has now been presented, and the Court has to make a decision based on the evidence presented to it.

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* Taken from Volume III of the transcript of the second trial, pp. 43-44.

The Court is going to make the decision that the opinion, memorandum opinion that the Court gave in September of 1969 is still valid. The Court is going to overrule the Government's contention. The Court is going to make a finding of fact against the Government as to the removability of the boats. The evidence at best is unsatisfactory that they could be removed.

The Court is of the view that at any time the boats could not be removed, but the Court also queries as to the effect or attempt at a later date, the Government having permitted Mr. Pete to remain, for whatever reason I don't know, but the Government permitted him to remain and he no longer had the advantage of that free Hubacohek way across the lake, and so on. It can be argued that just moving across the portage doesn't involve the lake, but I suppose in order to get equipment over, to get the Low-boy over and to get everything that would be needed, or dollies if it is a house moving job, and there was some inference from the evidence, all of that would have to be done either over the ice on a heavy-plowed way or would have to be floated over somehow in the summer in preparation for it. There is no evidence before the Court what equipment there is available for this sort of a move.

So the Court finds the facts to be that the boats are still not any more removable than they were before hearing this last evidence.

I hope the Court isn't one of these, having made up his mind, that nobody in the world can change it. I don't know.

* * * * *

APPENDIX H: DECLARATION OF TAKING ACT, 40 U.S.C.A. §258a

§ 258a. Same; lands, easements, or rights-of-way for public use; taking of possession and title in advance of final judgment; authority; procedure

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said decla-

ration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

Feb. 26, 1931, c. 307, § 1, 46 Stat. 1421.

APPENDIX 1: DISTRICT COURT ORDER GRANTING PLAINTIFF'S MOTION FOR A NEW TRIAL

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

No. 5–66 Civ. 6

UNITED STATES OF AMERICA,

Plaintiff,

vs.

967.905 ACRES OF LAND, more or less, situate in Cook, Lake, and St. Louis Counties, State of Minnesota, et al.,

Defendants.

Claim of Jacob Pete and James Pete, Landowners, as to Tracts No. 3520Cc and 4098

ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICTS, OR IN THE ALTERNATIVE FOR A REMITTITUR AND DENYING DEFENDANT LANDOWNERS' MOTION FOR AN ADDITUR AND GRANTING PLAINTIFF'S MOTION FOR A NEW TRIAL

NEVILLE, District Judge.

This eminent domain proceeding was tried before a jury at Duluth, Minnesota commencing June 23, 1969, culminating in verdicts returned July 3, 1969 on the basis of which judgments subsequently were entered in favor of the landowners and against the government in the amount of $56,000 as to Tract No. 4098 and $149,000 (including three cabin barges) as to

Tract No. 3520Cc. The basic facts of the case are for the most part detailed in this court's order of September 10, 1969 and accompanying memorandum opinion. See *United States v. 967.905 Acres of Land etc.*, —— F. Supp. —— (D. Minn. 9/10/69).

Now before the court and heard at Minneapolis, Minnesota on July 21, 1969 and on September 29, 1969 are three motions by the government (1) for judgment notwithstanding the verdicts, or in the alternative (2) for a remittitur, or in the alternative (3) for a new trial. The government in addition has moved separately for an order determining that all personalty on the three cabin barges is the property of the government, and allowing the government 7% per annum on the award of $149,000.00 for rental for the period the landowners have remained in possession during the pendency of this proceedings. Another separate motion requests an order expunging from the judgments heretofore entered, the provision permitting the taxation of costs against the govenment.[1] Also before the court is the landowners' motion for an additur and requesting an order in all other respects affirming the jury's award.

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[1] The case has a somewhat peculiar posture as to motions in that with the alternative verdict forms which were submitted by the court to the jury, the clerk was unable to enter judgment thereon without further order from the court. This was not entered until September 10, 1969. Both counsel, apparently being in doubt, filed timely motions measured from the date of the return of the verdicts, and then after the court's order of September 10, 1969 ordering the clerk to enter judgments, re-filed the same with additional motions. It was stipulated between the parties and agreeable to the court that the motions first filed could stand as though timely filed after the entry of judgment. The government particularly within the appropriate time after entry of judgment added some new material to its prior motion and some new motions based on its disagreement with the court's September 10th order. In any event, all motions are deemed timely and will be ruled on herein by the court to the extent necessary.

Robert G. Renner, United States Attorney, by Ralph E. Koenig, Esq., and Carl Strass, Esq., United States Department of Justice, Washington, D.C., appeared for the plaintiff; Robins, Davis & Lyons, St. Paul, Minnesota, by Solly Robins and Steven H. Goldberg, Esqs., appeared for defendant landowners.

The court does not believe it can nor should grant the government's motion for judgment notwithstanding the verdicts, which in essence would result in no award whatsoever to the landowners, and in view of this order granting a new trial, the court need not reach the government's motion for a remittitur nor the motion regarding taxation of costs, since the effect of granting a new trial is to vacate the judgments heretofore entered. The court has substantial doubt whether, even if so minded, it has the power to grant defendant landowners' motion for an additur, see *Dimick v. Schiedt*, 293 U.S. 474 (1935), and discussion in 6A MOORE'S, FEDERAL PRACTICE, ¶ 5905 [4] (2d ed.). Defendants cite *United States v. Kennesaw Mountain Battlefield Assn.*, 99 F. 2d 830 (5th Cir. 1938), in support of their contention. This case where both parties consented to the additur distinguishes a condemnation proceedings from other litigation governed by the Seventh Amendment to the United States Constitution and though criticized by MOORE (op cited above) does lend some support to defendants' position. Mowever the granting of the new trial herein renders this question moot and thus defendants' additur motion is denied.

The government's contentions embodied in paragraphs 1, 2 and 3 of its motion of 7/11/69 and paragraphs 1, 2A, 3 and 5 of its motion of 9/19/69 relate to and charge error in the court's holding that three certain cabin barges or boats were "taken" in the condemnation proceedings and are compensable.

This court's order of 9/10/69 puts this question at rest and the court believes its conclusions therein reached are sound and so denies any relief on this ground. On a retrial the court intends to proceed on the basis that these cabin barges or houseboats are included in the taking of Tract 3520Cc.

The government's motion in effect to prohibit the landowners from removing from the cabin barges or houseboats the dishes, linens, utensils, outboard motors, etc., is denied conformable to well established and consistent holdings that when a landowner's realty is condemned (of which the court considers the cabin barges to be a part) he does not lose title to his furniture and effects contained therein unless specifically so agreed or particularly included and compensation is paid therefor.

Originally the court, noting that the cabin barges or houseboats posed a difficult and vigorously contested question, requested the jury to return a verdict finding the value of the land in Tract 3520Cc *without* the boats and in the alternative the value *with* the boats. The jury found the value to be $64,000 without the boats and $149,000 with the boats, thus placing a valuation of $85,000 on the boats.

At the time the court had in mind that this procedure might facilitate a decision in the event of an appeal and might render unnecessary another trial whichever way ultimately it should be decided as to the boats. Unfortunately for this attempt, it appears to have aborted since a new trial will be required for the other reasons herein set out. This ruling and the new trial granted dispose of the government's assigned error in paragraph 4 of its original motion that the government was prejudiced because the court made it clear to the jury that it did not then know whether the boats would be held compensable and so submitted alternate verdict forms; that therefore the jury

might well have added enough to the award for the tracts of land alone so as to attempt to compensate the landowners for what it thought fair in the event ultimately the boats were not included as a part of the taking. This possibility will disappear on a retrial for the jury will be told that the cabin barges are includable and will be asked to include their valuation in any award it makes.

It does seem to the court that the question of the compensability of the boats and perhaps other rulings contained in this memorandum opinion particularly with reference to this court's application of the case of *United States v. Rands*, 389 U.S. 121 (1967), are controlling questions of law as to which there is substantial grounds for difference of opinion and, if the Court of Appeals were to agree, an immediate appeal might be desirable pursuant to 28 U.S.C. § 1292(b) so as to avoid a third trial of this case if the court be in error as to its views concerning the cabin barges and the other rulings of law embodied in this opinion. Absent convincing argument to the contrary, the court would be disposed on timely motion brought within twenty days from date of this order to grant such a certificate so that either party might request the Court of Appeals in its discretion for a review or appeal.

The principal error made by the court in the trial of the case, assuming the decision as to the compensability of the boats to be correct, was the failure to follow and apply the teachings of *United States v. Rands*, 389 U.S. 121 (1967), and its predecessor cases. This error pervaded the court's rulings on admissibility of evidence, the scope of examination of witnesses and the instructions to the jury. The court was of the view as urged by landowners' counsel that a landowner was entitled to compensation on the basis of the highest and best use of the land, with consideration given to the facts in this case that the land

had riparian rights, was strategically situated on a large lake and was one of the few lakeshore sites accessible through the use of the so-called four-mile portage. This view was error. Whatever the Minnesota state law is or may be as to riparian rights and their value, such is of no consideration in a federal condemnation where the body of water is a navigable one. There was no question raised, nor can there well be, that both Basswood Lake and South Farm Lake are navigable waters. The latest language of the Court of Appeals for the Eighth Circuit is embodied in *United States v. Birnbach*, 400 F. 2d 378 (8th Cir. 1968), where the court said:

> ". . . When the taker is the government and the taking is for navigational purposes, however, one important distinction must be made so that the enhancement in value 'flowing' from a riparian location may not be recognized when the riparian character of the land is destroyed. The government, because of its constitutional power to control navigation (the Commerce Clause), has always had the right to the entire flow of a navigable body of water. These factors may not be taken into consideration as against the government, and thus it appears that the court in this case applied an improper standard in determining severance damages. See, United States v. Rands, 1967, 389 U.S. 121, 88 S. Ct. 265, 19 L. Ed. 2d 329; United States v. Virginia Electric & Power Co., 1961, 365 U.S. 624, 629, 81 S. Ct. 784, 5 L. Ed. 2d 838; United States v. Twin City Power Co., 1956, 350 U.S. 222, 76 S. Ct. 259, 100 L. Ed. 240; and United States v. Commodore Park, Inc., 1945, 324 U.S. 386, 390-391, 65 S. Ct. 803, 89 L. Ed. 1017." 400 F. 2d at 382

. . .

". . . And, in River Rouge [United States v. River Rouge Imp. Co.], it was recognized that state law may give the riparian owner valuable rights of access to navigable waters good against other riparian owner; or against the State itself. 269 U.S. [411], at 418-419, 46 S. Ct. at 146-147 [70 L. Ed. 309]. But under *Twin City* and like cases, *those rights and values are not assertable against the superior rights of the United States, are not property within the meaning of the Fifth Amendment, and need not be paid for when appropriated by the United States. . . .*" 400 F. 2d at 383

In *United States v. Twin City Power Co.*, 350 U.S. 222 (1956), which was a five to four decision, the issue was sharply drawn as stated by Justice Burton in his dissenting opinion:

"The issue here is the determination of the compensation which, under the Fifth Amendment, must be paid for privately owned fast land adjoining a navigable stream when such land is taken by the United States for a public use. For the reasons hereafter stated, *I agree with the courts below that the proper measure of such compensation is the fair market value of the land at the time it is taken, and that this includes recognition of any fair market value of the land that is due to its riparian character.*" 350 U.S. at 229

. . . .

". . . In the face of decisions uniformly limiting that servitude to the bed of the stream, the Government would take 4,700 acres of private property for a public use, substantially without compensation therefor. This would enforce the Government's right of condemnation, while re-

> pudiating its constitutional obligation to pay for the private property taken," 350 U.S. at 245

The majority opinion held exactly what Justice Burton states it did and since then, *United States v. Rands*, 389 U.S. 121 (1967), has unanimously adopted the rule of the majority view in *Twin City Power Co.*

The power of the Federal government to regulate navigable waters under the Commerce Clause of the United States Constitution has been recognized since the time of *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 84 (1824). Riparian owners bordering on a navigable water are therefore subservient in their use of the water to the dominant servitude inhering in the Federal government and when and if the government deprives one of the riparian use of navigable water such is not a taking of property within the meaning of the Fifth Amendment to the United States Constitution and thus no compensation need be paid for the value of such riparian rights.

The Supreme Court has continually recognized the navigation servitude in such cases as *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 13 S. Ct. 622 (1893). It has been referred to as a "dominant right," *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 63, 33 S. Ct. 667, 672 (1913), a "superior authority," *United States v. Grand River Dam Authority*, 363 U.S. 229, 231, 80 S. Ct. 1134, 1137 (1960), a "superior navigation easement," *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 736, 70 S. Ct. 955, 961 (1950), and a "dominant servitude," *United States v. Rands*, 389 U.S. 121, 122, 88 S. Ct. 265, 267 (1967).

> "The Commerce Clause confers a unique position upon the Government in connection with navigable waters. 'The power to regulate commerce comprehends the control for

that purpose, and to the extent necessary, of all the navigable waters of the United States. . . . For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress.' . . . Thus, without being constitutionally obligated to pay compensation, the United States may change the course of a navigable stream. State of South Carolina v. State of Georgia, 93 U.S. 4, 23 L. Ed. 782 (1876), or otherwise impair or destroy a riparian owner's access to navigable waters, Gibson v. United States, 106 U.S. 269, 17 S. Ct. 578 (1897); Scranton v. Wheeler, 179 U.S. 141, 21 S. Ct. 48, 45 L. Ed. 126 (1900); United States v. Commodore Park, Inc., 324 U.S. 386, 65 S. Ct. 803, 89 L. Ed. 1017 (1945), even though the market value of the riparian owner's land is substantially diminished." 389 U.S. 122-24

. . .

". . . '*just as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss, . . . it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated.*' United States v. Virginia Elec. & Power Co., 365 U.S. 624, 629, 81 S. Ct. 784, 788, 5 L. Ed. 2d 838 (1961). . . . Such value does not 'inhere in these parcels as upland,' but depends on use of the water to which the company has no right as against the United States: 'The government had dominion over the water power of the rapids and falls, and cannot be required to pay any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use.'" 389 U.S. at 123-24 [emphasis added]

. . .

"We are asked to distinguish between the value of land as a power site and its value as a port site. In the power cases, the stream is used as a source of power to generate electricity. *In this case, for the property to have value as a port, vessels must be able to arrive and depart by water, meanwhile using the waterside facilities of the port. In both cases, special value arises from access to, and use of, navigable waters.* With regard to the constitutional duty to compensate a riparian owner, no distinction can be drawn. . . ." 389 U.S. at 124-25 [emphasis added]

. . .

"But under *Twin City* and like cases, *these rights and values are not assertable against the superior rights of the United States, are not property within the meaning of the Fifth Amendment, and need not be paid for when appropriated by the United States.* . . ." 389 U.S. at 126 [emphasis added],

In the *Rands* case the trial court ultimately was affirmed in holding the riparian land there taken to have a value only for sand, gravel and agricultural purposes. The court stated it thus:

". . . In the condemnation action, the trial judge determined that the compensable value of the land taken was limited to its value for sand, gravel, and agricultural purposes and that its special value as a port site could not be considered. The ultimate award was about one-fifth the claimed value of the land if used as a port. . . ." 389 U.S. at 122

It seems to the court, on reflection and after study, that it cannot ignore or disregard the clear mandate of the United

States Supreme Court and must therefore on a retrial limit the proof as to both the South Farm Lake and the Hoist Bay properties as to their value as timber, agricultural or recreational land, as though they were situate inland from Basswood Lake and South Farm Lake respectively. This runs contrary to the court's preconceived notions as to highest and best use, and seems to be a harsh rule but the court cannot read *Rands, Twin City Power Co.* and the other above cited cases any other way. Landowners' testimony of comparable sales and properties situate on lakeshore elsewhere therefore will not be admitted in evidence on a retrial and evidence of the valuation of the real estate will have to be limited to sales of comparable inland acreage with no valuation placed on the riparian uses of the property. The government has assigned as error the court's rulings admitting into evidence comparable sales of subdivided property situate on lakeshore and comprising individual lots. On retrial this objection will have to be sustained, and the jury will be instructed in accordance with what has been said herein as to methods of valuation.

It is true that most if not all of the above cases cited, particularly *Rands* and *Twin City Power Co.*, involved properties located on streams or rivers, as distinguished from lakes such as in the case at bar. The court does not believe that this is a basis for differentiation, however, since both lakes in the case at bar clearly are navigable waters, and the government's "dominant servitude" would seem clearly to be applicable to all navigable waters whether rivers, streams or lakes. A different problem presents itself in regard to the structures and improvements on the Hoist Bay Property, including the three cabin barges or boats. *Rands, Twin City Power Co., Birnbach* and the other cases above cited all deal with unimproved riparian land and none of the opinions appear to involve struc-

tures and improvements on the site. Whereas riparian rights are not "property" within the meaning of the Fifth Amendmen so as to be compensable when subject to the Federal Government's "dominant servitude," surely this is not applicable to the fixtures and improvements on the real estate. Certainly these are "property" and the government must compensate for their taking. The government in fact in reality concedes such as to most of the improvements and structures now on the Hoist Bay property. Certainly it cannot be the law that one who builds on a lakeshore and enjoys riparian rights as accorded by state law gambles and takes the chance that if a Federal condemnation occurs of fast lands and the government exercises its "dominant servitude", he does not receive the fair and reasonable value of his improvements based on what their fair market value would have been had there been no such condemnation or exercise. It cannot well be argued that the jury is required to look at the improvements as though the improvements were in the middle of the woods or the lake had dried up for instance or disappeared and evaluate them on that premise. While the jury must value the fast land as though it were not on a lakeshore but were inland because under *Rands* et al. the landowner has no "property" in the riparian rights, the court does not intend to apply such rule as to the improvememepts nor to the three boats nor to treat them as though they were built in the middle of the woods. The government has exercised its dominant servitude over the lake, but such does not and did not extend to nor reach the improvements nor render them valueless or less compensable. The servitude at best reaches only to high water mark. The court includes in improvements the three boats, the slip, the dock, the railed device for removing boats from the water as well as the cabins and other structures on the land. The government's

position and argument would lead to the conclusion that anything done to or constructed on the property that in any way relates to the use of the adjoining lake was built or constructed *ab initio* at the owner's risk and that now that the "dominant servitude" has been exercised, such improvements have no value and are not compensable. This argument carried to its logical conclusion could apply to all of the structures on the Hoist Bay Property, for all were built obviously because the property was on the shores of Basswood Lake. The court cannot subscribe to this line of reasoning, though it must bow to *Rands* et al. insofar as relating to the value of the fast lands without considering the improvements.

The government assigns as error the court's admission into evidence of reproduction cost less depreciation as to the Hoist Bay improvements, particularly the three boats. The court is of the opinion that such evidence properly was admitted and that it again will be admitted. While this is only one method of evaluation, it is difficult to find any other more reliable method in this case. The government has by its actions including the creation of the Boundary Waters Canoe Area rendered the property unsalable so that a willing buyer at least at this time is impossible to find. Fair market value should, of course, be considered as though there were no condemnation and the award for the improvements should not be greater nor less than normally it would be had the government not condemned or exercised its dominant servitude.

Generally, exercise of the power of eminent domain and other federal powers is subject to the requirement of the Fifth Amendment that payment of just compensation shall be made for all estates or interest in property so taken. Just compensation is usually defined in terms of the fair market value of the property or interest as of the date of the taking. *United*

States v. Miller, 317 U.S. 369, 374, 63 S. Ct. 276, 280 (1943). The typical standard of fair market value in the Eighth Circuit (subject however to *Rands* and its predecessors) and that prevailing in most if not all federal courts was set forth in *United States v. State of South Dakota Game, Fish & P. Department*, 329 F. 2d 665, 668 (8th Cir.), *cert. denied*, 379 U.S. 900 (1964), quoting from *Olson v. United States*, 297 U.S. 246, 54 S. Ct. 704 (1934):

> "Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held." 292 U.S. at 255, 54 S. Ct. at 708

Generally, all evidence on market value should relate to what a willing buyer would pay a willing seller for the land. *United States v. 3,698.63 Acres of Land, Etc.*, 416 F. 2d 65 (8th Cir. 1969). Sales of comparable land in the area most accurately evidence fair market value, *United States v. Featherston*, 325 F. 2d 539 (10th Cir. 1963); *United States v. Whitehurst*, 337 F. 2d 765 (4th Cir. 1964), but other methods or formulas for determining fair market value may be proper. *Sill Corp. v. United States*, 343 F. 2d 411, 416 (10th Cir.), *cert. denied*, 382 U.S. 840 (1965). For example, reproduction costs, capitalization of net income, cost less depreciation, or an interaction of

these determinants may also be considered. *United States v. 3,698.63 Acres of Land, Etc.*, 416 F. 2d 65 (8th Cir. 1969); *United States v. Certain Interest in Property, Etc.*, 296 F. 2d 264, 270 (4th Cir. 1961). Injury or inconvenience to a business being conducted upon the property condemned or other "consequential losses" are not compensable and are improper evidence of fair market value. *United States v. General Motors Corp.*, 323 U.S. 373, 379-80, 65 S. Ct. 357, 360 (1945); *A. C. Davis Ice Co. v. United States*, 362 F. 2d 934, 936 (1st Cir. 1966). The weight to be given to factual and opinion evidence on fair market value is for the jury. *United States v. 3,698.63 Acres of Land, Etc.*, 416 F. 2d 65 (8th Cir. 1969). The court will attempt to apply these general principles in instructing the jury and making evidentiary rulings during the retrial of this case.

Other methods of valuation may be shown, but the court does not intend to exclude evidence of reproduction costs less depreciation as one method of valuation, particularly in view of the difficulties inherent in the whole problem of valuation of the unique situation found in this case.

The government sought to show at trial that based on earnings and net income realized by the landowners over a five-year period preceding the institution of the condemnation proceedings, attributing an increment of income to the land itself, a valuation could be determined. The court permitted some testimony along this line, but did not permit use of figures. The government refers to this as economic appraisal evidence or the capitalization of income approach. Though this approach is fraught with a number of dangers, the court is of the view that such evidence including use of landowners' own figures should be received for such value as it has and for such guidance as it may be to the jury, accompanied by proper

instructions from the court. It seems to the court that in the jury's mind this approach may come dangerously close to appraising a going business and awarding compensation therefor contrary to *General Motors, supra*, but if the government wishes to produce such evidence, it will be unable later to complain.

Several other questions remain. The government assigns as error the lumping together of the two parcels comprising tract 3520Cc, and on a retrial the court can see no objection to asking the jury for separate awards as to the Hoist Bay Property and as to the 40 acre tract lying astride of the four-mile portage. As to the non-ownership by the landowners of land under water (except the man-made slip into the fast land at Hoist Bay) the court did instruct the jury to this effect and will do so again. The wild rice beds appear to be under water and not fast land and so should not be considered as owned by landowners. The court is accused by the government of having misstated the size of the Hoist Bay Property. If so, the court will attempt correctly to describe it on the retrial based on the evidence there produced. Plaintiff's expert witness referred to it as four acres of fast land and eight acres of the wild rice beds and the court used this figure. The court also is chided for having in its memorandum opinion of September 10, 1969 stated that the government conceded certain things. If the court erred in this regard it can be and will be cured at the new trial and if government counsel will be clear as to matters not conceded, no further problem should be encountered here. The government also assigns error because so its counsel states the court attempted to award damages for the cabin barges under the Tucker Act, 28 U.S.C. § 1346. Nothing is clearer than that the court recognized and so stated its juris-

dictional limitations in the memorandum opinion of September 10, 1969. Such an argument by government counsel is frivolous.

The government claims that some eight years prior to the condemnation, Jacob Pete bought the South Farm Lake property for approximately $3,500 from the County of Lake where it appeared on its tax forfeited land list. The jury awarded Pete $56,000, 16 times the purchase price, even though the tract has no access by road or otherwise than by flying into the lake. The court permitted landowners' expert to be cross-examined to show he had appraised this property for that County shortly before Pete bought it at approximately $3,400, but did not admit evidence of the actual sale on the theory that it could be claimed not to be a sale between a willing buyer and a willing seller because of the motive the County has in all such cases in restoring the land to the tax rolls so that it will become income producing. Further consideration has led the court to the view that the purchase by Pete and the sale price should be received in evidence, such not being in reality a forced sale and sufficiently recent so as to have probative value.

It is a generally accepted view that the decision as to the admissibility of the prior sales price of land is one of discretion for the trial court. *Love v. United States*, 141 F. 2d 981 (8th Cir. 1944); *Baetjer v. United States*, 143 F. 2d 391 (1st Cir. 1944); *Annotation*, 55 ALR 2d 791, 811.

Evidence of prior sales have been held to be probative and admissible as reflecting the market value of lands taken in condemnation proceedings. *United States v. Becktold Co.*, 129 F. 2d 473, 479 (8th Cir. 1942). The cases which support the above contention unanimously recognize the trial court's dis-

cretion to exclude remote or nonprobative transactions. *United States v. Ham*, 187 F. 2d 265 (8th Cir. 1951). In *Ham* the Appellate Court held that the trial court erred in refusing to allow the jury to consider the prior sale of the same property. The court's conception is that a forced sale is one under compulsion and is not voluntary, such as an execution sale, a foreclosure sale, an attachment sale, a condemnation sale, etc. A voluntary sale comes from a willing seller, and his motives for selling or his reasons for the sale generally do not render the sale a forced sale. *District of Columbia Redevelopment, Etc. v. 61 Parcels of Land, Etc.*, 235 F. 2d 864 (D.C. 1956). Such motives or reasons may however be brought out on cross-examination and thus be considerations for the jury as to the weight to be given the evidence. The motive, if any, behind the county's sale to Pete may be shown but go to the weight and not to admissibility of the testimony.

The government has asked the court for an order deducting 7% per annum from the award for tract 3520Cc for rental value of the use of the Hoist Bay property since January 20, 1966, the commencement of the condemnation proceedings. The court heard no evidence on this matter, nor was any offered. The court has no idea of why, how or under what arrangement Petes have remained in possession to date except some vague hearsay knowledge that such has been by an arrangement with the United States Forestry Service. In any event, the court cannot grant such an order absent any evidence to form a basis therefor.

The court has spoken rather freely as to what his rulings in all probability will be on a retrial of this case. This is done with the *caveat* that the court is considering the evidence pre-

sented or tendered at the last trial. It may well be that either or both parties will have different witnesses and adduce other evidence at a retrial and any opinions herein expressed may of course have to be modified accordingly. Further, the court always is willing to hear additional argument at the time of or prior to retrial as to the correctness of the views herein expressed, though as to the two main issues of the compensability of the three cabin barges and the applicability of the *Rands* doctrine, the court believes it has heard all the arguments on both sides and that the rulings herein made are the court's considered judgments and will remain firm.

Unless either party requests a certificate pursuant to 28 U.S.C. § 1292(b) within 20 days from the date of this order and as a result thereof an appeal is then pending and undecided, the case will stand for retrial before a jury at the May 1970 term of this court to be held in Duluth, Minnesota.

IT IS ORDERED that the judgments of this court entered herein on September 11, 1969 in the amount of $56,000 as to tract 4098 and $149,000 as to tract 3520Cc be and same hereby are vacated and a new trial as to all issues is hereby granted as to both tracts.

Dated: January 6, 1970.

PHILIP NEVILLE
United States District Judge

APPENDIX J: DISTRICT COURT ORDER DENYING MOTIONS BY BOTH PARTIES FOR A NEW TRIAL, AUGUST 10, 1970

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

No. 5–66 Civ. 6

UNITED STATES OF AMERICA,

Plaintiff,

vs.

967.905 ACRES OF LAND, more or less, situate in Cook, Lake, and St. Louis Counties, State of Minnesota, et al.,

Defendants.

Claim of Jacob Pete and James Pete, Landowners, as to Tracts No. 3520Cc and 4098

ORDER DENYING MOTIONS OF BOTH PARTIES FOR NEW TRIAL AND PLAINTIFF'S MOTION FOR RENT

Before the court and heard at St. Paul, Minnesota on July 22, 1970 are two motions by the United States Government, one for a new trial, the other for rent from January 20, 1966, and a counter motion by the landowners also for a new trial. Robert C. Renner, United States Attorney, by Thorwald H. Anderson, Esq., Assistant United States Attorney, appeared

for the plaintiff; Robins, Davis & Lyons, St. Paul, Minnesota, by Solly Robins, Esq., appeared for defendant landowners.

The court heard the arguments of counsel, has examined the memorandum submitted, and on the basis thereof and on all the files, records and proceedings herein,

IT IS ORDERED that all of the above motions brought by both of the parties be, and the same hereby are denied.

Dated: August 10, 1970.

PHILIP NEVILLE
United States District Judge

MEMORANDUM

The above condemnation case twice has been tried to a jury. After the first trial, at which the jury returned a total verdict of $205,000, the court entered an order dated September 10, 1969, see *United States v. 967.905 Acres of Land, Etc., Cook Co., Minn.*, 305 F. Supp. 83 (D. Minn. 1969), holding that certain boats or cabin barges were within the taking effected by the United States. Later and on January 6, 1970 the court, without retreating from or reversing its prior order of September 10, 1969 became convinced and aware that it had committed error on quite different grounds in its instructions to the jury and concerning the admissibility of certain evidence. The court therefore ordered a new trial. The court by further order of February 9, 1970, certified the case under 28 U.S.C. § 1292(b) but the Court of Appeals declined to accept the appeal.

The second trial occurred at Duluth, Minnesota, resulting in total jury verdict on June 24, 1970 of $178,500. The court does not believe that any error was committed in this second trial, and is of the opinion that the instructions were proper and that the second jury verdict is a fair and reasonable one.

The government's motion for a new trial is premised on the court's action at the second trial in permitting the jury to award compensation for the boats or Cabin Barges and in the giving of certain instructions. Again, the court maintains the views advanced in its order of September 10, 1969 though the government at a preliminary hearing before the opening of the second trial, attempted by additional evidence to establish the removability of the boats. A reading of the transcript, together with the court's comments dictated into the record, amply sustain and in fact fortify the court's prior conclusions. Further the court sees no error in its instructions to the jury at the second trial, which followed its pattern outlined in the court's January 6, 1970 new trial order.

The government's motion for rent must be denied. The court stated in its order of January 6, 1970 concerning this issue:

> "The government has asked the court for an order deducting 7% per annum from the award for tract 3520Cc for rental value of the use of the Hoist Bay property since January 20, 1966, the commencement of the condemnation proceedings. The court heard no evidence on this matter, nor was any offered. The court has no idea of why, how or under what arrangement Petes have remained in possession to date except some vague hearsay knowledge that such has been by an arrangement with the United States Forestry Service. In any event, the court cannot grant such an order absent any evidence to form a basis therefor."

No further evidence was adduced on this issue at the second trial, nor was the subject then mentioned or argued. During 1970, the landowners have not been permitted to operate their

resort business. At the argument on these motions the court inquired of the Assistant United States Attorney concerning the arrangement between the government and the landowners. He replied:

> "Mr. Anderson: Well, yes, I know what the people from the Forestry Service tell me, and if you want me to tell you that, I can.
>
> The Forestry Service tells me that, A, they wanted to cooperate with the Petes in connection with negotiating this thing out and they had hopes right up to the last minute that it wouldn't come to trial; and, B, they felt the boats were not compensable and they thought 'He is not going to be compensated for these boats and we will let him use the site there and earn some money, which, in kind of approximate justice will compensate him for that.'
>
> Frankly, I don't think the reason is relevant. He did use the land.
>
> The Court: And he did use the boats.
>
> Mr. Anderson: He did use the boats and we have earned rent; and that is the essence of the argument, and I think the only defense is a contract by somebody authorized by the government to enter into it that rent was waived."

The attorney for the landowners quite properly, it would seem, urges that if the court were to consider passing on the question of rent, it ought to hear evidence on the arrangements between the government and the landowners and all of the surrounding circumstances, correspondence and stipulations and not merely deduct an arbitrary sum from the jury's condemnation award based on the bare fact that the landowners

have remained in possession for some time after the date of taking, in January 1966.

The landowners' motion for a new trial is denied. Their attorney claims that the court refused to permit a showing of the highest and best use of the land on Basswood Lake, i.e., a commercial resort enterprise. In the order of January 6, 1970 the court discussed *United States v. Reynolds*, 389 U.S. 121 (1967) at some length and believes that case governed this trial. As a matter of fact the government did not insist on the full thrust of some of the wording contained in the court's order of January 6, 1970 and the court believes for the reason stated in that order that the second trial jury instructions were proper and the theory on which the case proceeded was correct. The landowners of course would like a larger award; but in the court's opinion the jury award was fair and should not be set aside.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-826

967,905 ACRES OF LAND IN COOK, LAKE AND ST. LOUIS COUNTIES, MINNESOTA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

We respectfully invite the Court's attention to the following facts which show that the petition was filed out of time.

On September 23, 1971, the court of appeals denied a petition for rehearing (Pet. App. A-23), and the judgment of the court was entered on that day. The 90-day period for filing a petition for a writ of certiorari prescribed by 28 U.S.C. 2101(c) expired on December 22, 1971, and no extension of time was granted. The petition for a writ of certiorari was filed on December 23, 1971. Since the statutory time limitation is jurisdictional, the petition should be denied.

457-290—72——1

Petitioners correctly point out (Pet. 2) that the court of appeals modified its opinion, at the government's request, on October 1, 1971 (Pet. App. A–24). This did not, however, alter the date of the court's judgment. By its own terms, the modification concerns only the court's opinion, not its judgment. Moreover, the modification did nothing more than change a few words to correct a factual error in the court's original opinion. This did not affect any matters of substance or the parties' rights, and therefore the time to petition for a writ of certiorari did not begin to run anew. *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 209–213; *Department of Banking* v. *Pink*, 317 U.S. 264.

Respectfully submitted.

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FEBRUARY 1972.